5/3.

SUPREME COURT OF THE UNITED STATES.

No. ~~38~~. 47.

SYDNEY GREGG, BY N. B. CRAIG, HER COMMITTEE, PLAINTIFF IN ERROR,

VERSUS

LESSEE OF GABRIEL SWAYZE AND WIFE.

ERROR TO THE DISTRICT COURT U. S. FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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Pleas had in the district court United States, western district of Pennsylvania, before the honorable Thomas Irwin, esquire, judge of United States for the said district, at October sessions, 1832.

UNITED STATES,
Western District of Pennsylvania, } *ss.*

The President of the United States to the Marshal of the western district of Pennsylvania, greeting:

[SEAL.]

Whereas Sidney Gregg, by her committee, N. B. Craig, esqr., has this day sued out her writ of error to a certain judgment in ejectment recovered against her on the 23d day of October, A. D. 1832, in the district court of the United States for the western district of Pennsylvania, aforesaid, by Gabriel Swayze and Mary his wife, plaintiffs, and Sidney Gregg, defendant, returnable in the Supreme Court of the United States on the second Monday of January: These are, therefore, to command you that you make known to the said Gabriel Swayze and Mary his wife, that they be and appear to the said writ of error in the said Supreme Court, on the first day of the next term thereof, to hear an assignment of errors thereof; and hereof fail not at your peril; and how you shall have executed this writ of citation, make return to our said clerk of our said western district of Pennsylvania, at Pittsburgh, on the rule day of said court for the month of November next.

Witness, the honorable Thomas Irwin, esquire, judge of the United States for the western district of Pennsylvania, at Pittsburgh, this twenty-ninth day of October, A. D. 1832, in the fifty-seventh year of the independence of the United States.

TH. IRWIN.

This citation served on me, November 9, 1832.

W. W. FETTERMAN,
Att'y of
SWAYZE & WIFE.

Lessee of GABRIEL SWAYZE & LYDIA his wife, } *In the District Court*
vs. } *of the U. S. for the*
SIDNEY GREGG, by N. B. CRAIG, her committee. } *W'n Dist. of Penna.*

Know all men by these presents, that I, Neville B. Craig, am held and firmly bound unto Gabriel Swaize and Lydia his wife, in the sum of two thousand dollars, to be paid to the said Gabriel Swayze and Lydia his wife, their executors or administrators: to which payment, well and truly to be made and done, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated this sixth day of November, A. D. 1832. Whereas, the above named N. B. Craig, as the committee of Mrs. Sidney Gregg, hath presented a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above suit, in which the said lessee of Gabriel Swayze and Lydia his wife are plaintiffs, and Sidney Gregg, by her committee, N. B. Craig, are defendants. Now, therefore, the condition of this obligation is such, that, if the above named Sidney Gregg, by her said committee, shall prosecute her said writ of error with effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void, otherwise to be and remain in full force and virtue.

NEVILLE B. CRAIG. [SEAL.]

Sealed and delivered in presence of

Mr. Craig is sufficient bail.

W. FORWARD.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judge of the United States [SEAL.] *for the Western District of Pennsylvania:*

Because, in the records and proceedings, as also in the rendition of the judgment of a plea, which, in the said court, before you, between Richard Smith, a citizen of the State of Mississippi, lessee of Gabriel Swayze and Lydia his wife, citizens of the same State, plaintiffs, and William Styles, a citizen of the State of Pennsylvania, with notice to Sidney Gregg, by her committee, Neville B. Craig, citizens of the same State, tenant in possession, defendant, a manifest error hath happened to the great damage of the defendant, as by her complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done. Witness, the honorable Thomas Irwin, judge of the United States for the western district of Pennsylvania, the twenty-third day of October, A. D. 1832, and of the independence of the United States the fifty-seventh.

For EDWARD J. ROBERTS,
Clk. District Court W. D. P.
S. A. ROBERTS.

I, Thomas Irwin, judge of the United States for the western district of Pennsylvania, having taken and approved the bond of Neville B. Craig, esquire, the committee of the person and estate of Sidney Gregg, with security, do allow this writ of error. Witness my hand and seal, the 8th day of November, 1832.

TH. IRWIN. [SEAL.]

In the District Court of the United States in and for the Western District of Pennsylvania. May Sessions, 1830.

PENNSYLVANIA, *Western District, ss.*

William Styles, late of the district of Pennsylvania, yeoman, a citizen of the State of Pennsylvania, was attached to answer Richard Smith, a citizen of the State of Mississippi, of a *a* plea; wherefore, with force and arms, he entered into one messuage seventy acres of woodlands, seventy acres of arable land, seventy acres of meadow land, seventy acres of pasture land, and seventy acres of other land, with the appurtenances, situate and being in Alleghany county, in the district aforesaid, which Gabriel Swayze and Lydia his wife, *a* citizens of the State of Mississippi, had demised to the said Richard Smith, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the United States. And, whereupon, the said Richard, by W. W. Fetterman, his attorney, complains, that whereas the said Gabriel Swayze, and Lydia his wife, on the first day of January,

in the year of our Lord one thousand eight hundred and fifteen, at the district aforesaid, had demised to the said Richard the tenements aforesaid, with the appurtenances, to have and to hold the same to the said Richard and his assigns, from the day next immediately *proceeding* the day aforesaid, for and during, and unto the full end and term of thirty years then next ensuing, and fully to be complete and ended; by virtue of which said demise, the said Richard entered into the said tenements, with the appurtenances, and was thereof possessed; and the said Richard being so thereof possessed, the said William, afterwards, to wit, on the same day and year aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which the said Gabriel and Lydia demised to the said Richard in form aforesaid, for the term aforesaid, which is not yet expired, and ejected him out of his said farm, and other wrongs to him did, to his great damage, and against the peace of the United States. Whereupon, the said Richard saith he is injured, and hath sustained damage to the value of one thousand dollars; and thereupon, he brings suit.

JOHN DOE, } *Pledges to prose-*
RICHARD ROE, } *cute.*

To Oliver Ormsby and Sidney Gregg, by her committee Neville B. Craig, citizen of the western district of the State of Pennsylvania, resident in Alleghany county, tenant in possession of the premises, or some part thereof.

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear at the next May sessions of the district court of the United States for the western district of Pennsylvania, by some attorney of that court, then and there by a rule of the same court to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession.

Your loving friend,
WILLIAM STILES.

Served 3d May, 1830.
JNO. M. DAVIS, *Marshal.*

In the District Court of United States for the Western District of Pennsylvania, of May term, 1830, *No.* 23.

RICHARD SMITH, a citizen of the State of Mississippi, lessee of GABRIAL SWAYZE, and LYDIA his wife, citizens of the same State,

vs.

WILLIAM STILES, a citizen of the western district of Pennsylvania, with notice to OLIVER ORMSBY and SIDNEY GREGG, by N. B. CRAIG, her committee, tenants in possession.

Be it remembered, that at May term, 1830, came the above named plaintiffs, and impleaded in this court the above named defendants, of a plea wherefore with force and arms, &c., (prout narr.;) and the said defendants, thereupon pleaded they were not guilty of the supposed tresspasses and ejectment so laid to their charge, (pront pleas.) And, whereupon, the issue was joined between the said parties. And afterwards, to wit, at the October term of the said court, A. D. 1832, before the hon. Thomas Irwin, the aforesaid

issue so joined, came to be tried by a jury for that purpose duly empannelled; at which day came the said parties, by their respective attorneys, and the jurors of the jury aforesaid also came, and were in due manner then and there chosen to try the said issue under their oaths and affirmations. And the counsel for the plaintiffs, to maintain and prove said issue, gave in evidence, amongst other matters, a deed from John Penn, jr , and John Penn to Nathaniel Bedford, dated the 31st day of May, A. D. 1786, for sixty-two acres of land on the Monongahela river, in the manor of Pittsburgh, being acknowledged on the 1st day of June, A. D. 1786, in the city of Philadelphia, before Edward Shippen, and recorded in the office for the recording of deeds in and for the county of Washington, in book , page , dated the 31st day of May, 1786; also, an assignment endorsed upon said deed, of all the right, title, claim, and interest of the said Nathaniel Bedford to the premises, to Mrs. Jane Ormsby, dated the 1st day of June, A. D. 1786, and acknowledged before the said Edward Shippen, at the aforesaid city of Philadelphia, hereto annexed, marked A; also, a certificate of the recorder of the county of Washington, dated the 15th October, 1831, that there is no record of the transfer of the title to the premises aforesaid by said N. Bedford, to Mrs. Jane Ormsby, in the office of Washington county. It was then admitted by the attorneys for the parties aforesaid, that the children of John and Jane Ormsby were Mrs. Bedford, who died on the 8th day of July, A. D. 1790, without issue; John Ormsby, jr., who died in August, A. D. 1795; Joseph B. Ormsby, who died on the 20th December, A. D. 1803; Oliver Ormsby, who died in the year 1832; and the present defendant, Mrs. Sidney Gregg, who is the only survivor, and, under the providence of God, a lunatic. It was further admitted, that Mrs. Jane Ormsby, the wife of John Ormsby, died intestate on the 13th day of June, A. D. 1799, and that her husband, John Ormsby, died on the 19th day of December, A. D. 1805. Then plaintiffs then offered the depositions of Mary Swayze, Mary Green, Sarah Hopkins, Jacob Philis, William Adams, taken under the authority of a commission directed to Samuel Postlewait, and executed on the 7th day of September, A. D. 1829, (hereunto annexed, marked B,) for the purpose of establishing the facts of the marriage of the aforesaid John Ormsby, junior, with Lydia Swayze, and that the present plaintiff, Mary Swayze, has the only offspring of that marriage, together with other circumstances. To the reading of which depositions, the counsel for the defendant objected, and were overruled by the court, (prout the same;) and the said counsel for the defendants excepted to the said opinion, and requested the court to seal this bill of exceptions; which was accordingly done. Plaintiff's counsel then offered to read in evidence a letter from John Ormsby, jr., to Nathan Swayze, dated at Buffalo, in July, 1791, (prout the same;) also, a letter from John Ormsby, jr., to Lydia Ormsby, of the same date, after having first proved the signatures to be those of John Ormsby, jr., (prout the same, hereunto annexed, marked C.) To the admission of said letters in evidence, the counsel for defendants objected, and the objections being overruled, the said counsel for defendants excepted to the opinion of the court, and requested the court to seal a bill of exceptions, whereby the same might appear, which was done accordingly. The possession of Mrs. Gregg of the 25 acres, and of the 8 acres and 122 perches; the upper part of the 62 acre tract was then admitted by the counsel for defendants.

Plaintiffs further offered in evidence a petition to the orphans' court of the county of Allegheny, signed by O. Ormsby and N. B. Craig, as the com-

mittee of Mrs. Sidney Gregg, and filed in No. 18 of November term, A. D. 1828; (prout the same, hereto annexed, marked D,) and, lastly, a letter of Ormsby to Mrs. Mary Swayze, dated Natchez, 19th March, A. D. 1828, to which the counsel for the defendants objected; and they were rejected by the court; and the said counsel for the plaintiff excepted to such rejection, and requested the court to seal a bill of exceptions; (which was done accordingly. Among other evidence the counsel for the defendants proved by the testimony of John Hutchison, that he had known the family of Mr. Ormsby for forty years, and lived as a tenant under the old gentleman and his son, Oliver Ormsby, about thirty-five years, and sometimes in their families before old John Ormsby's death. Isaac Gregg, (his son-in-law) as early as the year 1799, employed hands to clear out the piece of property where the ferry-house now stands. The part next the hill being cleared, and the part next the river was in woods; that the said Gregg employed his brother and himself, who cut off the timber into cord wood; that Mr. Gregg was cautious in showing them the lines marked by a post on the bank, and a butterwood tree blazed above the run that emptied into the river four or five rods; that we should not cut the timber below it—the land below belonging to Mr. Ormsby; that, in the year eighteen hundred, Mr. Gregg employed them to go up the hill, and to cut timber to build a house, and for fences; and, in the autumn of 1800, the house was put up by them Mr. Gregg employed: he (Mr. Gregg) gave seventy-five or eighty dollars for doing it. Mr. Gregg put Alexander Gibson as a tenant in the house, who occupied it that fall and the succeeding winter, and made an agreement with Mr. Gregg to have it for several years, but ran off. Samuel Emmet went into the house in the spring of 1801, and occupied it for a great number of years. George Kintzer was in it for many years after Emmet. Andrew Rearich was there. Young lived in it a year; also, George Boners occupied it for six months. Jacob Drake was there a year. These tenants were all put in by Isaac Gregg and his family: he also stated that he recollected Isaac Gregg having gotten another lot adjoining the 25 acre lot, and between it and the bridge, about twenty-nine years ago. Mr. Gregg was to allow John Tate, his tenant, out of the rent for putting up a barn, and I (Hutcheson) helped Tate to clear it out. When we were doing so, showed us the bounds of both lots, and told us not to go below them. There were posts at each corner bounding the lower lot. There were also locust trees below, and Mr. Gregg was careful not to disturb them. The barn is there yet, and in good order. There was a square log house put up a considerable time before the barn. Mr. Gregg intended to build there, and dig a cellar, but abandoned it, and went over to build on Scotch hill. I don't know who put up the log house; it was put up about the time Mr. Gregg dug the cellar. On the 25 acre lot there was the ferry-house, a stable, and a large shade, under which market people hitched their horses. Mr. Gregg employed men to make these improvements. The fences were put round the upper piece in the fall of 1800. I helped to cut the timber, and to haul the rails. The second or lower lot was fenced long before that; we used to plant potatoes there. Mr. Gregg put up a post and rail fence twenty nine or thirty years ago. The fences since that time to this have always continued up, have been repaired, new ones built, and made better. At that time and I never understood that any one else than Isaac Gregg was the owner of the property, he always rented it. When I speak of the property, I mean the 25 acre, and the 8 acre 122 per. lots. Mr. Gregg showed us the line between him and the balance of the

property running down to the bridge, about 29 or 30 years ago, when he showed us the corners. The reason he gave me for not cutting the timber below was, that it belonged to his father-in-law, and he was particular about it.

James Ross, Esq., testified, among other things, that he was acquainted with John Ormsby's family in 1782, who lived at a ferry on the south side of the Monongahela river: at that time the manor had not a single acre sold out of it. In 1784, Colonel Woods, as the agent for the Penns, surveyed the 62 acres tract in controversy, and not in his draft that the tract was plotted for John Ormsby. After the reservation of this lot for Mr. Ormsby, the manor was subdivided. Mr. Woods and Mr. Brackenridge, who were the counsel for Mr. Ormsby, recommended that the deed should be taken out in her name. Doctor Bedford, who was the son-in-law of Mr. and Mrs. Ormsby, proceeded to Philadelphia for that purpose, and brought back the title; the money was likely accumulated by the frugality of Mrs. Ormsby. Isaac Gregg was in possession of the property before the date of the deeds to him. In 1802, I passed with Woods and others in a carriage over the ferry, and Mr. Gregg was and had the ferry. Mr. Gregg and his family, and their tenants, have held possession ever since. All the houses and improvements were put up by Mr. Gregg.

The defendants also examined George Kintzer and David McMullin, whose testimony did not vary materially from that reported. Defendants also produced and read in evidence two deeds; the first from John Ormsby, jr., to Isaac and Sidney Gregg, dated the 24 day of November, 1804, acknowledged day of December, 1804, and recorded in Alleghany county, on the 22d June, 1805, for 25 acres of land, &c.; (prout thereto annexed;) also a deed from same to Sidney Gregg, dated 13 April, A. D. 1805, acknowledged the same day, and recorded in Alleghany county on the 22 June, 1805, for 8 acres 122 perches, (also hereto annexed, marked E and F.) Divers leases of the different tenants of Isaac Gregg and his family, after his disease, were read in evidence. Defendants also read in evidence the assessment books, by which it appeares that the property in controversy had been assessed in the name of Isaac Gregg and his heirs from the year 1804, '5 up to the time of the trial; and that the taxes had been paid by them. The defendants also read in evidence the will of Joseph B. Ormsby, dated the 30th May, A. D. 1803, at New Orleans, in which he devises his interest in the property in controversy. (Prout the same, appended hereto, and marked G.) Defendants also referred to an action of partition instituted in the common pleas of Alleghany county, by the present plaintiffs, against the present defendants, Oliver Ormsby, No. 207, of April term, 1829; in which a judgment had been rendered in favor of defendants, and upon which, a writ of error had been sued out by the plaintiffs to the supreme court of Pennsylvania, and was still pending and undetermined then, (marked B.)

The plaintiff's counsel then proved, by the testimony of Samuel Pettigrew, esqr., that he was one of the viewers appointed by the orphans' court under the petition the 23d Dec., 1832, before referred to; that the viewers went on the ground, and allotted a portion of the upper part of the tract to Mrs. Gregg, and the lower part to Mrs. Ormsby. This report was not filed on the records of the court, and is lost or mislaid.

The counsel for the defendants then offered to prove, by the testimony of H. M. Watts, who was attorney for Mr. Ormsby, and presented the petition above referred to, that it was done, at the instance of Mr. Ormsby, for

the purpose of establishing his title to the lower part of the tract; that, at the time said partition was signed, it was done, reluctantly, by Mr. N. B. Craig, as the committee of Mrs. Greg; and understood that Mrs. Gregg had heretofore claimed the portion of the tract she occupied in severalty; and that said petition, and the decree of the court upon it, was not to affect her right. Which testimony was objected to by plaintiffs' counsel, and rejected by the court: whereupon, the court was requested to make an exception to their opinion, which was accordingly done, and sealed; and the learned judge, thereupon, gave in charge to the jury, among other things upon the several points proposed both by the counsel for the plaintiffs and the counsel for the defendants.

The points proposed by counsel for the defendants, were as follows, to wit:

1. To entitle the plaintiffs to recover, on the ground that Mrs. Swayze is a child, and heir of John Ormsby, they must prove that there was an actual marriage of John Ormsby to her mother.

2. That the statute of limitations does apply to tenants in common; and if the jury shall believe that the land in question belonged to Jane Ormsby, and descended upon Mary Swayze and the other heirs, yet the statute of limitations would be a bar to plaintiff's recovery if there was an actual adverse and continuous possession in the deft., and them under whom she claims, for 21 years.

3. That, if the jury shall believe the testimony of James Ross, Jno. Hutchinson, and George Kintzer, the facts sworn to by them establish that kind of actual continuous and adverse possession acknowledged by the courts as coming up to, and fully within the provisions of the laws of limitations.

4. That the matter relied on by the plaintiff to defeat the operation of the statute of limitations cannot avail them, in the present action, upon the law side of the court, they should resort to chancery.

5. That the holder of a deed or the vendee of land, is not bound to record his deed; and that the mere circumstance of a married woman omitting to record her deed, is not considered a fraud as against her own child or grandchild, who paid no money, nor were purchasers for a valuable consideration.

6. That the mere possession of land is of itself notice of an equity.

7. If the land in question was bought with the money of old Mr. Ormsby, it was his estate. And if it was bought with the money of the wife, and the deed to her, in her name, to secure the advance, it gave her an equity which became her surviving husbands upon her death.

8. That, in the case of tenants in common, where an adverse, actual, and continued, possession has been proved for 21 years, an actual ouster will be presumed.

9. That, in the present case, of the witnesses if the defts. are believed by the jury, and that Isaac Gregg actually fenced, enclosed, and occupied, exclusively, the land in dispute; and that occupancy has been uninterruptedly continued by the present deft. and her heirs for 21 years; it will be available in law, and a bar, although Isaac Gregg may have originally entered as a trespasser.

10. That, at the period of 1824–'5, it was not settled in Pennsylvania in case of a conveyance during coverture of real estate to a wife, what the law was; whether the deed was not absolutely void, or, if not void, whether or not it enured to the use of the husband, and whether the husband's assent was not necessary to give it validity.

11. That if the land in question did really belong to Mrs. Jane Ormsby and that her husband, John Ormsby, who survived her, was only tenant by the curtesy, then the conveyance by him to Gregg and wife in 1804, and that of 1805 to Mrs. Gregg, brought them in possession under the tenant by the curtesy; and the heirs of Mrs. Jane Ormbsy, being reversioners, would have no right to the possession during the life of John Ormsby, sr.; and in such case Gregg's possession cannot be considered as theirs, nor referred to their right.

12. That where a man enters by color of title, and claims the whole, possession of part is, in law, possession of the whole, so far as to give advantage of the statute.

13. That the proceedings and judgment in partition upon the writ issued by Mrs. Swayze, are evidence that the parties did not hold as tenants in common; and, also, evidence of an ouster.

H. M. WATTS,
WM. WILKINS,
Counsels for Defendant.

LESSEE OF SWAYZE and WIFE, *vs.* SIDNEY GREGG. } *District Court, Pittsburgh. October Term,* 1832.

Extracts from the Charge.—"Besides the right which is supposed to be acquired by the defendant by the settlement of her husband on the land in question, in 1799, and the subsequent improvements made by him, she claims under two deeds, one from John Ormsby to her and Isaac Gregg, dated the 24th of November, 1804, for 25 acres; the other from John Ormsby to her, dated the 13th April, 1805, for 8 acres 122 perches. These deeds convey the fee simple in consideration of natural love and affection. John Ormsby had no such estate to convey; the fee had been in Jane Ormsby, his wife; and, upon her death, he became the tenant by the courtesy, and had no power to bind the inheritance. The deed of the husband cannot pass his wife's lands, and no possession of the lands by the grantee, under the grant, can create a presumption of title, or become adverse to the true owner. An act or deed which is void can't be the foundation of an adverse possession, for it can give no color of title; and a void title is not such a conveyance as that a possession under it will be protected under the statute of limitations. The conveyance by N. Bedford to Jane Ormsby was endorsed on the deed from the Penns to N. Bedford; and the conveyance by John Ormsby to Isaac and Sidney Gregg, recite the conveyance to Bedford. It must, therefore, be presumed that John Ormsby had possession of the deed from the Penns to N. Bedford; and that he, at least, was conusant of the title of the heirs of Jane Ormsby. The deeds to Isaac Gregg and to Sidney Gregg set forth a conveyance from N. Bedford to John Ormsby: such a deed, however, was never made. While that is admitted, the recital of it is attempted to be justified on either grounds. It is clear that the deed from N. Bedford to Jane Ormsby was withheld from the record by John Ormsby, and there is evidence enough to infer that it was suppressed by him; for, being in possession of that deed, as is assumed, from the recital just mentioned, he had authority to direct it to be recorded. His omission to do so, his false recital of a deed to himself N. Bedford for the same land, and his concealment of the existence of any conveyance to Jane Ormsby, leave no doubt of his intention to suppress that conveyance. This conduct was

fraudulent on the part of John Ormsby; and it is not material whether Isaac Gregg and Sidney Gregg were parties to it or not, since no estate can be acquired by a fraudulent grant: covinous conveyance of land is as no conveyance, as against the interest intended to be defrauded. And it must follow, that no act or deed which is fraudulent can be the foundation of an adverse possession, because, being absolutely void, and and not merely voidable, it cannot afford color of title, and without color of title there is nothing whereby an adverse possession can be obtained; and for this reason: The statute of limitations do not extend to cases of fraud, and only begin to run from the time the fraud became known to the person then having the title. Whence the grantee is a purchaser for a valuable consideration, from a person who has not a good title, or no title at all, and has no notice, either actual or constructive, from the face of his deed or from the deed through which he defaces his title, he may set up his adverse possession, and be protected by the statute; but all purchasers for a valuable consideration are effected with constructive notice of all that is apparent upon the face of the title deeds under which they claim.

The right of Sidney Gregg, as one of the heirs of Jane Ormsby, if any she has as such, to the actual possession of the land, accrued after the death of John Ormsby, jr., which took place on the nineteenth of December, 1805. She may have then entered as one of the heirs of Jane Ormsby, and since that time to the time of bringing this suit, has held, as she alleges, adversely to her co tenants in common, and relies upon the *state* of limitation to protect her in her claim. A possession to prevent a recovery or vest a right under the statute of limitations must be actual, continued, adverse, and exclusive; and it is a settled principle, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner; and whenever an adverse possession is relied on, there should be some proof of an actual ouster. The possession of one tenant in common is *primæ faciæ* the possession of his companion, and the possession of the one can never be considered as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent. And if one tenant in common enters generally, without saying for whom, it will be implied that he enters according to law, that is, for himself and the other tenant or tenants. To rebut this presumption of the law, an actual ouster must be proved; which, however, be inferred from circumstances of which the jury are to judge. They may presume an actual ouster where one tenant in common enters on the whole, takes the profits, and claims the whole, exclusively, for 21 years. Under such circumstance, his possessions becomes adverse, and the act of limitations, begin to run. But a bare perception of profits by one tenant in common is not an ouster of his co-tenant. The statute will not run where one holds as tenant in common during the minority of his co-tenant. "That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not to be construed into adverse an possession"—5 Wheaton, 124. What facts constitutes an ouster, and what adverse possession, must be determined by a jury. The party against whom the adverse possession is claimed cannot be concluded by it, if he labor under any of the disabilities pointed out by the act of Assembly of this State, or where his co-tenant,

claiming adversely, has been guilty of fraud, by concealing or suppressing the title.

Cohabitation and reputation, including the declarations of deceased members of the family, are evidence of the fact of marriage, and of the state and condition of the family. After the death of parents, direct evidence of marriage can seldom be obtained. If the parents cohabited, and husband and wife acknowledged, and addressed each other in society as such, and recognized the child as their own, it affords the strongest presumption that they stood in the relation of husband and wife, parent and child.

If Isaac Gregg entered upon the land adversely, fenced, enclosed, and occupied it exclusively, and that occupation has been uninterruptedly continued for twenty-one years, it would be available as a bar, although Isaac Gregg may have originally entered as a trespasser; but the acceptance of the deeds from John Ormsby, jr., in 1804 and 1805, although these deeds were void as to the inheritance, must lead us to conclude that he held under John Ormsby, sr. The petition to the orphans' court for a partition of the land in December, 1828, supports this view of the case, and both acts show a disaffirmance of the title by settlement and improvement, if any existed.

In this action, the jurisdiction of the court in case of fraud cannot be disputed. It exercises it concurrently with a court of equity, and it will avail the plaintiff, if sustained by proof. It is clear that the holder of a deed, or the vender of land, is not bound to record his deed, and the omission to do so of itself furnishes no ground of fraud; and in the case put by the counsel for the defendant, of a married woman omitting to record her deed, is certainly not evidence of fraud, as against her own child or grandchild, who paid no money, nor were purchasers for a valuable consideration. It is equally clear that the mere possession of land is of itself notice and equity, but we cannot, in this action, inquire into the equitable rights of the parties, on the ground assumed by the defendant. The legal title is in Jane Ormsby, and whether it was purchased out of her own separate funds, or otherwise, the right of her heirs cannot here be affected by any equitable claim of the surviving husband to the land. A conveyance during coverture, of real estate to a wife, was always sufficient to vest the estate in the wife, and the deed was never held to be void.

The husband's assent was not necessary to give it validity, as without his express dissent would be implied, nor could it enure to his use otherwise than in right of his wife. If the title was in Jane Ormsby, and her husband, John Ormsby, who married her, was tenant by the curtesy, Gregg and wife by the conveyances of 1804 and 1805 held under him, and the heirs of Jane Ormsby would have no right to the possession during the life of John Ormsby, jr. Gregg's possession being therefore under him, their right to claim possession as tenants in common would not arise until after his death.

A person entering by color of title, and claiming the whole possession of part, is in law *law* possession of the whole, and would be protected by the statute.

The petition of O. Ormsby and N. B. Craig to the orphans' court, for a partition of the land, shows that they claim under Jane Ormsby, and that whatever right the defendant may have derived from the possession of the land by her husband in 1799, or by the deeds of 1804 and 1805, it was not deemed prudent to rely upon it. But the petition will not interfere with the statute of limitations, if it commenced running after the death of John Ormsby, jr., by the entry and adverse possession of Isaac Gregg, as it does

not recognize any right in the plaintiff, or show that either of the petitioner stood in relation to the plaintiffs as tenants in common. On the contrary, i in effect disclaims such relation, and among other matters may be evidence of an ouster; but that is for the consideration of the jury." To which said several matters so given in charge by the learned judge, the counsel for the defendants did object, and inasmuch as the same, and the evidence in the cause do not appear by the record; the defendants counsel did propose the aforesaid exceptions, and did request the learned judge to put his seal to this bill of exceptions: which was thereupon done.

TH. IRWIN. [SEAL.]

Copy of Docket Entries. May Term, 1830.

Fetterman. RICHARD SMITH, *Smith*, a citizen of the State of Mississippi, lessee of GABRIEL SWAYZE and his wife, citizens of the same State,

vs. 22.

Watts for Ormsby by Kennedy. WILLIAM STILES, a citizen of the western district of Pennsylvania, with notice to Oliver Ormsby and Mrs. Sidney Gregg, by her committee, Neville B. Craig, esquire, tenant in possession.

Ejectment returned served May 3d, 1830. Mar. $4 05.

1830, May 8. On motion of Mr. Fetterman—rule to plead in thirty days or judgment.

May 15, affidavits of defence filed; same day, on motion of Mr. Watts, rule on plaintiff to enter security for costs—(copy.)

May 17, service of rule accepted by plaintiff's attorney '29; and now, to wit, May 29, 1830, the said Oliver Ormsby, by his attorney, Jno. Kennedy, pleads non cul, &c. Same day, Sidney Gregg, by her committee, N. B. Craig, esqr., pleads non cul, &c.—(sea pleas filed.)

October 19, continued by plaintiffs.

1831, May 2d, continued.

" October 15, stipulation of James P. Stuart, as security for costs, filed.

" November 8, subpœna on part of defendant to James Ross, esqr., David McMullin, George Kintzer, Jacob Beltzhoover, John Hutchison, and Mark Huling.

1831, November the 14th, continued at costs of defendants.

1832, May 3d, agreement of attorneys, "that the depositions may be read which were taken in an action pending between the same parties in the common pleas of Alleghany county"—filed.

1832, May 7, continued. 1832, October the 8th, subpœna on part of plaintiffs to Jacob Beltzhoover and Peter Mowry.

1832, October 10, subpœna on part of defendants to James Ross, esqr., David McMullin, George Kintzer, Jacob Beltzhoover, John Hutchison, and Mark Hulings—p'd by N. B'd.)*

1832, October 19 and 20, and 22d, (the 21st being Sunday,) tried by jury; and on the morning of the 23, verdict for the plaintiffs for the undivided fourth part of the thirty-three acres, and one hundred and twenty-two perches.

1832, October 29, citation issued.

October 23d, 1832, the jury, empannelled as aforesaid, rendered their ver-

* (Omitted above.) Death of Oliver Ormsby suggested, and suit as to him abated.

dict, finding in favor of the plaintiffs for the undivided fourth part of thirty-three acres and one hundred twenty-two perches.

And the said defendant, by her committee, N. B. Craig, having, according to the provisions of the several acts of Congress in such cases made and provided, filed her bond, which was approved of the court, (a copy whereof is attached to this record,) and perfected his appeal to the Supreme Court of the United States at Washington city; which said appeal is allowed by the court. And I, the clerk of the said court, being directed accordingly, do hereby certify that the whole record thereof is truly copied, and that I have, in so certifying, fully complied with the orders of said court, and the provisions of the acts of Congress in such cases made and provided.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at the city of Pittsburgh, the 10th day of July, A. D. 1832, and of the independence of the United States the fifty-seventh.

E. J. ROBERTS, *Clk.*

Costs of clerk, mars., and crier, and Watts, as attorney, paid.

A.

This indenture, made the thirty-first day of May, in the year of our Lord one thousand seven hundred and eighty-six, between the honorable John Penn, junior, and John Penn, of the city of Philadelphia, in the commonwealth of Pennsylvania, esquires, late proprietors of Pennsylvania, of the one part, and Nathaniel Bedford, of the town of Pittsburgh, in the county of Westmoreland, in Pennsylvania aforesaid, practitioner in physic, of the other part, witnesseth, That the said John Penn, junior, and John Penn, for and in consideration of the sum of one hundred and twenty-four pounds, lawful money of Pennsylvania, in specie, unto them, at or immediately before the sealing and delivery hereof, by the said Nathaniel Bedford, well and truly paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release, and confirm, unto the said Nathaniel Bedford, and to his heirs and assigns, a certain tract or piece of land, situate on the river Monongahela, in the manor of Pittsburgh, part of the tract called the Coal Hill, in the county of Washington, in Pennsylvania aforesaid, beginning at a Spanish oak standing by the side of the said Monongahela river; thence extending by land of John Ormsby, south two degrees east, one hundred and twenty-eight perches, to a stake in the northwesterly side of a road; thence extending by the same the four following courses and distances, viz. North sixty-five degrees, west one hundred and six perches, to a stake; north seventy four degrees, west twenty-six perches, to a stake; north sixty degrees, west fifty-five perches, to a stake; and north sixty-three degrees, west ninety-five perches, to a stake in a corner of said road, and in the line of lot No. 54; thence, by the same lot, north thirty-five degrees, east to the said river; thence up the same, the several courses thereof, to the place of beginning, containing sixty two acres, together with all and singular the ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever, thereunto belonging, or in any wise appertaining, and the reversions remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, use, possession, property, claim, and demand whatsoever, of them, the said John Penn, junior, and John Penn, and their heirs respectively, of, in, and to the hereby granted or mentioned to be granted premises; to have and to hold the said described

piece or tract of land, hereditaments, and premises, hereby granted or mentioned to be granted, with the appurtenances, unto the said Nathaniel Bedford, his heirs and assigns, to and for the only proper use and behoof of the said Nathaniel Bedford, his heirs and assigns, forever. And the said John Penn, junior, and John Penn, for themselves, their heirs, executors, and administrators, respectively, do covenant, promise, and grant, to and with the said Nathaniel Bedford, his heirs and assigns, by these presents, that they, the said John Penn, junior, and John Penn, and their heirs respectively, and *and* singular the said described piece or tract of land, hereditaments, and premises, hereby granted or mentioned so to be, with the appurtenances, unto the said Nathaniel Bedford, his heirs and assigns, against them, the said John Penn, junior, and John Penn, and their heirs respectively, and against all and every other person or persons whatsoever, lawfully claiming, or to claim, by, from, or under them, or any or either of them, shall and will warrant and for ever defend, by these presents. In witness whereof, the said parties have interchangeably set their hands and seals hereunto. Dated the day and year first above written.

JOHN PENN, jr. [SEAL.]
JOHN PENN. [SEAL.]

Sealed and delivered, by the said John Penn, junior, in the presence of us.
PETER MILLER.
JOHN COTHUGER.

Sealed and delivered, by the said John Penn, in the presence of us.
PETER MILLER.
JOHN COTHUGER.

Received the day above written, of the above written, of the above named Nathaniel Bedford, the sum of one hundred and twenty-four pounds, in specie, being the full consideration money above mentioned.

TENCH FRANCES, acting for
JOHN PENN, jr., and
JOHN PENN.

Teste: PETER MILLER.

Endorsed on deed.

Be it remembered, that, on the first day of June, A. D. 1786, before me, Edward Shippen, esquire, president of the court of common pleas for the county of Philadelphia, came Peter Miller, of the city of Philadelphia, gentleman, and, upon his solemn affirmation, according to law, did say that he was present, and did see the within named John Penn, esquire, seal, and, as his act and deed, deliver the within written indenture; and that he did also see John Cothinger subscribe his name, as witness to the execution thereof; and that the name Peter Miller, thereunto also subscribed, as witness to the execution thereof, is of his own handwriting. Witness, my hand and seal.

EDWARD SHIPPEN. [SEAL.]

A.

Endorsed on deed.

To all people to whom these presents shall come, the within named Nathaniel Bedford sendeth, greeting: Know ye, that the said Nathaniel Bedford, for and in consideration of the sum of one hundred and twenty four pounds, lawful money of Pennsylvania, in specie, unto him in hand paid,

by Jane Ormsby, wife of John Ormsby, of Pittsburgh, merchant, and before the sealing and delivery hereof, the receipt whereof the said Nathaniel Bedford doth hereby acknowledge, hath granted, bargained, sold, released, and confirmed, and by these presents doth grant, bargain, sell, release, and confirm, unto the said Jane Ormsby, her heirs and assigns, all this the within described tract or piece of land, situate in the manor of Pittsburgh, in the county of Westmoreland, in the *the* State of Pennsylvania, bounded and described as the same is within described, and containing sixty-two acres, as within described and mentioned, together with the appurtenances, and all his, the said Nathaniel Bedford's, estate, right, title, interest, use, possession, property, claim, and demand whatsoever, of, in, and to the premises, to have and to hold the said piece or tract of land, hereditaments, and premises, hereby granted, or mentioned to be granted, with the appurtenances, unto the said Jane Ormsby, her heirs and assigns, to the only proper use and behoof of the said Jane Ormsby, her heirs, and assigns.

In witness whereof, the said Nathaniel Bedford hath hereunto set his hand and seal, the first day of June, in the year of our Lord one thousand seven hundred and eighty six.

NATH'L BEDFORD. [SEAL.]

Sealed and delivered in the presence of us,
PETER MILLER.
JOHN NANCARROW.

Received, the day above said, of Mrs. Ormsby, the sum of one hundred and twenty-four pounds, in full of the consideration above mentioned by me.

NATH'L BEDFORD.

Teste: PETER MILLER.
JOHN NANCARROW.

WASHINGTON COUNTY, *ss.*

Personally appeared before me, the subscriber, a justice for the county aforesaid, Doctor Nathaniel Bedford, and acknowledged the above deed to be his act and deed, and desired the same to be recorded as such.

JO. T. W. DOUGLASS.

WASHINGTON COUNTY, *ss.*

The within deed and probate, recorded in the office for recording of deeds, in and for said county, in lib. D., folio 113 and 114. Given under my hand and seal of office, the 30th day of October, A. D. 1786.

THOMAS STOKELY, *Recorder.*

B.

In the Court of Common Pleas of Alleghany county, of April term, A. D. 1829.—*No.* 207.

Fetterman. GABRIEL SWAYZE and MARY his wife, formerly MARY ORMSBY,
vs. [narr.]
Watts for Ormsby. OLIVER ORMSBY and SIDNEY GREGG, by NEVILLE B. CRAIG, the committee of her person and estate.

Summons in partition for a tract of land in St. Clair township. Mr. Watts appears for Mr. Ormsby, and waives the service.

Writ upon him. Service accepted.

WM. CAVIN, *Sheriff.* $1 25.

June 9th, 1829—Rule on part of plaintiff for a commission to issue, to be directed to Samuel Postlethwaite, of Natchez, Mississippi. Commission to take testimony on interrogatories, filed same day, (copy charged Fett.) July 24th, 1829—Commission issued, (fees $1 25, charged Fett.) June 9th, 1829—Rule to plead. August 31, 1829—Defendants plea, non tenant in simul. September 25, 1829—Commission returned November, 1829—Entered. February 4, 1830—Tried by jury, and verdict for defendant. February 20, 1830—Judgment cessen ex. for three weeks. July 16, 1830—Writ of error filed.

ALLEGHANY COUNTY, *ss.*

I certify the foregoing to be truly copied from the record of the court of common pleas of said county.

Witness my hand, and the seal of said court.

WM. McCANDLESS, *Pro.*

GABRIEL SWAYZE, and MARY his wife, formerly MARY ORMSBY,
vs.
OLIVER ORMSBY and SIDNEY GREGG, by N. B. CRAIG, the committee of her person.

In pursuance of the annexed commission, I have caused Mary Green and Mary Swayze to come before me, to be examined according to the interrogatories hereunto annexed. Sarah Swayze being first sworn, deposeth and saith, in answer to interrogatory the first, that she is acquainted with Gabriel Swayze, and Mary his wife; that she is not acquainted with the defendants, except that she heard John Ormsby say, when in this country, that he had a brother of the name of Oliver Ormsby; that she has known Mary Swayze since her birth. In answer to interrogatory the second, deponent saith, that she knew John Ormsby about the year seventeen hundred and eighty-nine, in the now State of Mississippi; that she knew him from one to two years before his marriage with Lydia Swayze, the mother of Mary Swayze, one of the plaintiffs; that she knew him from the time she first saw him, in 1789, till about two years after the birth of Mary Swayze; that she does not know, of her own knowledge, from whence he came; but have heard him say that he came from Pittsburgh, Pennsylvania, where he said his father lived; that she does not know where he died.

In answer to interrogatory third, deponent saith: John Ormsby married Lydia Swayze, at about what time she does not recollect, but thinks it to be about forty years since; that they were married by Justice King, who was duly authorized to so do by the Spanish Government, who was in the habit at that time, of marrying great numbers of persons; that she was present at the marriage, and waited as bride's maid upon said Ormsby's wife, Lydia Swayze; that he lived with his wife about three years after their marriage, during which time, Mary, the wife of Gabriel Swayze, and one of the plaintiffs in this case, was born. They had no other children except said Mary, who was born about the year 1791, being about thirty-

eight years ago. Said Mary was married when about nineteen years of age to Michael Bruner, and afterwards, in eighteen hundred and fifteen, to Gabriel Swayze, who, with herself, are plaintiffs in this case. Her first husband, M. Bruner, died about four years after their marriage.

In answer to interrogatory the fourth, the deponent saith: John Ormsby and his wife were living on the river Homochitte, about seventeen mile from Natchez, now in the State of Mississippi, at the time of the birth of their daughter and only child, Mary, now Mary Swayze, one of the plaintiffs in this case; that said John Ormsby and his wife lived together after the birth of said Mary, until the said Mary was running about; that said John Ormsby and said Lydia lived together, and were reputed as man and wife, and that the plaintiff, Mary, was always acknowledged by said John as his child.

In answer to interrogatory fifth, deponent saith, that she does not know who the father of John Ormsby was, but has heard John Ormsby, father one of the defendants, say that his father's name was John Ormsby, and that he lived in Pittsburgh, Pennsylvania.

In answer to interrogatory the seventh, deponent further saith, that she knows of nothing further material for the plaintiff. her

MARY + SWAYZE.
mark.

Taken, sworn, and subscribed to, before me, this fifth of September, 1829.

SAM'L POSTLETHWAITE, *Com'r.* [SEAL.]

At the same time and place, came and appeared before the undersigned, as aforesaid, Mary Green, another witness named in the annexed commission, who, being duly sworn, saith, in answer to interrogatory first, as propounded to her, and written in said commission, that she is and has been acquainted with Gabriel Swayze, plaintiff in this case, since they were children going to school; the defendants she does not know. At the time she first knew said Mary, she went by the name of Mary Ormsby, and was reputed as the daughter of John Ormsby, junior. In answer to interrogatory second, the deponent saith that she was acquainted with John Ormsby, the reputed father of Mary Swayze, in Bourbon county, State of Kentucky, for about the years 1796 and 1797; that she has always heard that said John Ormsby died about 1799; that she heard him say, repeatedly, that he was a native of Pittsburgh.

In answer to interrogatory third, deponent saith that she knows nothing of her own knowledge, but that, after she came to this country, she heard that Lydia Swayze, the mother of the plaintiff, Mary, had married John Ormsby, and always understood Mary Swayze, one of the plaintiffs, to be the only child of that marriage; and also remarked the strong resemblance of the said Mary to her father, and has also heard her husband remark the same.

In answer to interrogatory fourth, the deponent saith that Gabriel Swayze is the husband of Mary Swayze, formerly Mary Ormsby.

To the fifth, she says that she has often heard John Ormsby say that he came from Pittsburgh, which is all she knows relative to interrogatory fourth. And further this deponent saith not.

MARY GREEN.

Taken, sworn, and subscribed to, before me, this 5th September, 1829.

SAM'L POSTLETHWAITE, *Com'r.* [SEAL.]

At the same time and place, came and appeared before the undersigned, Sarah Hopkins, who, being duly sworn, saith, in answer to interrogatory first, as propounded to Mary Swayze, that she is and has been acquainted with the plaintiff in this suit for thirty-seven years. The defendants she has seen at John Ormsby's father's. That she has seen John Ormsby, junior, at a little town below Pittsburgh, called Legionville. That she called at John Ormsby, senior's, in Pittsburgh, to see John Ormsby, junior, having understood that he, John Ormsby, junior, had a wife and child in this country. That she was informed at John Ormsby, senior's, that John Ormsby, junior, was then at Legionville, below Pittsburgh. That she afterwards called at Legionville, and there saw John Ormsby, junior; that he then spoke of his wife and child in this country, then called the Natchee country, and did at that time, as well as deponent recollects, send a barrel of flour, and other things, to his wife and child. That John Ormsby, junior, distinctly spoke of his wife and child in this country, and of his wife being the daughter of Nathan Swayze, of this country. That immediately after seeing Mr. John Ormsby, junior, as aforesaid, she came on to this country, when and where she became acquainted with Mrs. Ormsby and her daughter, now Mary Swayze, who was then between two and three years old. At that time, Mrs. Ormsby was reputed to be the wife of John Ormsby, junior, and her child, now Mary Swayze, was his reputed child. That she and her husband always remarked the resemblance between the now Mary Swayze and her father, John Ormsby, junior. That Mr. Hopkins, the husband of this deponent, had been acquainted with John Ormsby in this country, which was the reason of their calling on John Ormsby, senior, at Pittsburgh, and after on John Ormsby, junior, at Legionville. At the time of calling at John Ormsby, senior's, she there met Sidney and Oliver Ormsby, sister and brother of John Ormsby, junior, and they then spoke of John Ormsby, junior, their brother, and also spoke of his being married in the Natchez country, and spoke of sending some clothes to their brother's wife's child. That she was here when Mary Swayze married Gabriel Swayze, both plaintiffs in this case. That, after coming to this country, she always understood that John Ormsby, junior, had married Lydia Swayze, daughter of Nathan Swayze, in this country; and that Mary Swayze, one of the present plaintiffs, was the only child of that marriage, and who then went by the name of Mary Ormsby, and whose mother was called Mrs. Ormsby. That, from the time she arrived in this country, about 1793, or about 37 years ago, every person spoke of Mrs. Ormsby being the wife of John Ormsby, junior, and of Mary Ormsby, now Mary Swayze, being the only child by their marriage. And in relation to other interrogatories, this deponent knoweth nothing further.

her
SARAH + HOPKINS.
mark.

Taken, sworn, and subscribed to, before me, this fifth of September, 1829.
SAM'L POSTLETHWAITE, *Com'r.* [SEAL.]

Afterwards, to wit, on the seventh day of September, 1829, appeared before the undersigned, as aforesaid, in pursuance of the commission, as annexed, Jacob Phillis, who, being duly sworn, says, in answer to interrogatory first, of the last set of interrogatories in said commission, that he is and has been acquainted with the plaintiffs in this cause since they were

children; that he is slightly acquainted with Oliver Ormsby and Lydia Gregg, but is well acquainted with their family connexions.

In answer to interrogatory the second, deponent says, that he was acquainted with John Ormsby, junior, familiarly; that he knew him, the said John Ormsby, junior, before he came to this country, at Pittsburgh. That said John Ormsby, junior, was owned, by John Ormsby, senior, to be his son. That he afterwards knew said John Ormsby, junior, in this country, for four or five years, say about the years 1789 to 1792. That, about the winter of 1795, 1796, or 1796 and 1797, he heard of the death of said John Ormsby, junior, by an advertisement in the public papers, of Oliver Ormsby's being the administrator of the estate of the said John Ormsby, junior, which advertisement stated that John Ormsby, junior, at Lexington, in Kentucky.

In answer to interrogatory the third, deponent says, that John Ormsby, junior, was married in this country, to Lydia Swayze, the daughter of Nathan Swayze; that he was not present at the marriage, but that the same was notoriously spoken of at the time. That he often saw the said John junior, with his said wife; and that they lived together, for a length of time, as man and wife. That the fruit of that marriage was a daughter, then called Mary Ormsby, and now living, and known by the name of Mary Swayze, the present wife of Gabriel Swayze, and plaintiffs in this case. At the time of the birth of said Mary, said John Ormsby, junior, and his wife, were living in the neighborhood of Nathan Swayze, 16 or 17 mile from Natchez. That he has often heard said John Ormsby, junior, speak of his said child Mary, and between whom and her father there was a very strong resemblance.

In answer to interrogatory fifth, deponent states that he has already answered, that John Ormsby, junior, was the son of John Ormsby, of Pittsburgh.

In answer to interrogatory the sixth, deponent states that the annexed letters of John Ormsby, senior, to his son, John Ormsby, junior, was handed to him by Gabriel Swayze, one of the plaintiffs in this cause. That he is not of sufficient recollection to recollect the handwriting of John Ormsby, senior; but that he recollects the handwriting of John Ormsby, junior, and that he wrote a fair and plain hand write. Deponent further states, that he knows nothing further material for plaintiffs in this cause, to the best of his recollection.

And deponent further states, that the foregoing statements have all been made by him, to the best of his recollection, after a long lapse of time.

JACOB PHILLIS.

Sworn to, taken, and subscribed, before me, this 7th September, 1829.

S. POSTLETHWAITE, *Com'r.* [SEAL.]

Also, to wit, on the seventh of September, 1829, appeared before the undersigned. as aforesaid, William Adams, who, being duly sworn, in answer to interrogatory first, that he is acquainted with Gabriel Swayze, one of the plaintiffs, but not with his wife, Mary Swayze, one of the plaintiffs. That he was acquainted with John Ormsby, junior, when he was in this country, many years since. That he always understood that he said John Ormsby, junior, was married in this country to Lydia Swayze, daughter of Nathan Swayze. That he was not at their wedding, but that he was in the neighborhood. That their marriage was always notoriously spoken of, and

that they lived together as man and wife. That he always understood that the fruit of their marriage was a daughter, and which daughter has always understood to be the present wife of Gabriel Swayze, one of the plaintiffs. That he has always lived in this country since the marriage of John Ormsby, junior, with Lydia Swayze, and has never heard the same doubted, and has never heard it doubted of Mary Swayze, the daughter of the said John Ormsby, junior, and said Lydia, his wife.

That he does not know when John Ormsby, junior, died; and that he knows nothing further material in this case for plaintiffs.

WILLIAM ADAMS.

Taken, subscribed, and sworn to, before me, this 7th September, 1829.

SAM'L POSTLETHWAITE, *Com'r.* [SEAL.]

PITTSBURGH, *January* 1, 1789.

DEAR JOHNNY: I wrote to you, lately, by a Doctor Powless, recommended to the care of Colonel Brown, at the Natchez, or to the care of Mr. Daniel Clarke, at New Orleans. The principal purport of the above mentioned letter, was a strong recommendation for you to readiness to join Colonel George Morgan, who is on his way down to the mouth of the Ohio, accompanied by a large number of surveyors and adventurers, in order to lay out a large city on west side of the Mississippi, and at the most convenient spot from the mouth of the Ohio to the river St. Francis. An immense tract of the above land is to be surveyed as soon as possible for the accommodation of adventurers. It would be needless for me to give you a description of that beautiful country, as you must be well informed of its climate and luxuriancy of soil. All I shall mention on this subject is, that your du I earnestly recommend, may lay our strict on you, to join Colonel Morgan on the earlie information of his arrival in that country. Your capacity as a surveyor it matters but as you are well versed in the theory, prac make you perfect. I have not sold a foot of land since this, but shall endeavor to sell part for and if possible, a few negroes, with I received a letter from your brother Oliver, lately, dated at Winnebago, in answer to mine, wherein strongly recommended him to join in the above Oliver seems to approve of it much, and says has no objection to join, providing he may dispose of some part of his effects, to enable him to make a decent figure in that new world. What you have done where you are, whether in this or the other world, I know not; but this I am sure of, that your dear mother and I have you never out of our thoughts. Our prayers are also put up to the Supreme *Being*, for your health and preservation.

I have nothing now to mention. Doctor Bedford and your sister are well, and join in love to you. Your mother and I enjoy tolerable health; the rest of the family are well, and join in love to you. I shall now conclude, with my ardent prayers to the Almighty Lord for your welfare, and that you may look back with horror on your juvenile folly and mismanagement.

I am, my dear child,

Your affectionate father,

JOHN ORMSBY.

Mr. JOHN ORMSBY, junior,
at the Natchez, or at New Orleans.

Honored by Colonel George Morgan.

THE STATE OF MISSISSIPPI,
City of Natchez, and Adams County.

I, Samuel Postlethwaite, commissioner, as named in the annexed commission, do hereby certify the annexed and foregoing written eleven pages to be the true answer of the respective deponents, whose names are therein subscribed to the several interrogatories, as propounded to them by the annexed commission; and that I caused the said several deponents to come before me, at the several times stated in the foregoing pages, and examined them upon oath concerning such things as they knew in relation to the matters and things therein mentioned, in the interrogatories mentioned in said commission, as annexed; and that I am, by the laws of the State of Mississippi, authorized to administer an oath, as a justice of the peace in and for Adams county, in said State.

Given under my hand and seal, this seventh day of September, A. D. 1829.

SAM'L POSTLETHWAITE, [SEAL.]
Commissioner and J. P. of Adams Co., State of Mississippi.

In the Court of Common Pleas of Alleghany County, of April term, A. D. 1829. *No.* 207.

Fetterman. GABRIEL SWAYZE, and MARY his wife, formerly MARY ORMSBY,

vs.

Watts for Ormsby. OLIVER ORMSBY and SIDNEY GREGG, by N. B. CRAIG, the committee of her person and estate.

Summons in partition. And now, to wit, June 9, 1829, rule in part of plaintiff for a commission, directed to Samuel Postlethwaite, esquire, of Natchez, Mississippi, commissioner to take testimony on interrogatories, filed same day. A true copy from the record.

WM. McCANDLESS, *Pro.*

Interrogatories to be administered to witnesses on part of the plaintiff to be produced, sworn, and examined, before the above named commissioner.

Interrogatories to be put to Mary Green, a witness on part of plaintiff:

Interrogatory 1. Are you acquainted with the parties to the above cause, any or either of them? If yea, state particularly how long, when, and where.

Interrogatory 2. Were you acquainted with the father of Mary Swayze, the plaintiff, and with her mother? If yea, when, where, and how long? what was *her* names, and when did they die?

Interrogatory 3. What do you know of the marriage of John Ormsby to Lydia Swayze, the mother of the present Mary Swayze? when were they married? how long did they live together? what children had they after their marriage? State at length.

Interrogatory 4. Who is the husband of Mary Swayze, formerly Mary Ormsby?

Interrogatory 5. Of whom was John Ormsby the son? where did his family reside? where had he come from?

Interrogatory 6. D you know any other matter, or thing material to the plaintiff? If yea, state the same as fully as if specially interrogated thereto

Interrogatories to be administered to Mary Swayze, a witness on part of plaintiff:

Interrogatory 1. Are you acquainted with the parties to this cause, plaintiff or defendant, or either of them? If yea, state where and how long, fully and particularly.

Interrogatory 2. Were you acquainted with John Ormsby, who was in your country? If yea, state when you first became acquainted with him, how long you knew him, where he came from, and when he died.

Interrogatory 3. To whom was John Ormsby married? when? by whom? were you at the marriage? how long did John Ormsby live with her? how many children had they? is the plaintiff, Mary, one of them? when was she born? when was she married to Gabriel Swayze? State at length.

Interrogatory 4. Where were John Ormsby and his wife living when Mary, the plaintiff, was born? how long did they live together after her birth? were they reputed, and did they cohabit together, as man and wife? Have you heard John Ormsby naming the child?

Interrogatory 5. Of whom was John Ormsby the reputed son? from what part of the country he came? where did his parents reside? State at length.

Interrogatory 6. By whom were the attached letters, now showing, written? in whose possession were they found? are you acquainted with the handwriting? how did you derive your knowledge of it?

Interrogatory 7. Do you know any other matter or thing material to plaintiff? If yea, state the same as fully as if specially interrogated thereto.

The same last interrogatories will be administered to Israel Coleman, Mr. Bouth, and other witnesses, to be produced, sworn, and examined, on part of the plaintiff, before the same commissioner.

W. W. FETTERMAN, *Pl'ff's Att'y.*

Commission issued July 24, 1829—Fees $1 25.

STATE OF PENNSYLVANIA, } *ss.*
Alleghany County, }

The Commonwealth of Pennsylvania, to Samuel Postlethwaite, esquire, Natchez, State of Mississippi, greeting:

Know ye, that we, in consequence of your integrity and abilities, have ppointed, and do give unto you full power and authority, and by these presents do require and enjoin you, that at such certain days and places as you shall appoint, you call and cause to come before you certain witnesses on the part of the plaintiff in the within cause, and them diligently examine, upon oath or affirmation, of and concerning such things as they shall know in a certain action of partition in our county court of common pleas, for the county of Alleghany aforesaid, between Gabriel Swayze, and Mary, his wife, formerly Mary Ormsby, plaintiffs, and Oliver Ormsby, and Sidney Gregg, the committee of her person and estate, defendant; which examination you shall plainly and distinctly put in writing, and, under your hand and seal, shall certify into our said court, at the city of Pittsburgh, without delay, enclosed and sealed, together with this writ, and the subjoined interrogatories.

Witness, the honorable Charles Shaler, esquire, president of our said court, at the city of Pittsburgh, in the county of Alleghany aforesaid, this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and twenty-nine, and of the sovereignty and independence of the United States of America, the fifty-fourth.

Attest: WM. McCANDLESS, *Pro.*

In the Court of Common Pleas of Alleghany county, of April term, 1829. *No.* 207.

Fetterman. GABRIEL SWAYZE, and MARY his wife, formerly MARY ORMSBY,
vs.
Watts for Ormsby. OLIVER ORMSBY and SIDNEY GREGG, by NEVILLE B. CRAIG, the committee of her person and property.

Partition. And now, to wit, June 9, 1829, rule on part of the plaintiff for a commission to issue, directed to Samuel Postlethwaite, of Natchez, Mississippi. Commission to take testimony on interrogatories, same day. Interrogatories filed. Extract from the record.

WM. McCANDLESS, *Pro.*

To the defendants above named, H. M. Watts and Neville B. Craig, the attorneys:

Take notice, that, unless you join in the above, by nominating an additional commissioner, filing up interrogatories, the same will issue fifteen days ex parte.

W. W. FETTERMAN, *Pro. In.*

June 12, 1829.

We agree that the commission may issue forthwith.

CRAIG & WATTS, *for Def'ts.*

July 18, 1829.

In the Court of Common Pleas of Alleghany county, of April term, A. D. 1829. *No.* 207.

GABRIEL SWAYZE, and MARY his wife, formerly MARY ORMSBY,
vs.
OLIVER ORMSBY, and SIDNEY GREGG, by her committee, N. B. CRAIG.

Interrogatories to be administered to witnesses on part of the plaintiff, to be produced, sworn, and examined, before Samuel Postlethwaite, esquire, of Natchez, in the State of Mississippi, commissioner to take testimony in interrogatories filed. Interrogatorie to be Mary Green, a witness on part of plaintiff.

Interrogatory 1. Are you acquainted with the parties to the above cause, any or either of them? If yea, state particularly, how long, when, and where.

Interrogatory 2. Were you acquainted with the father of Mary Swayze? when were they married? how long did they live together? what children had they after their marriage? State at length.

Interrogatory 4. Who is the husband of Mary Swayze, formerly Mary Ormsby?

Interrogatory 5. Of whom was John Ormsby the son? where did he last reside? where had he come from?

Interrogatory 6. Do you know any other matter or thing material to the plaintiff? If yea, state the same as fully as if specially interrogated thereto.

Interrogatories to be administered to Sarah Swayze, a witness on part of plaintiff.

Interrogatory 1. Are you acquainted with the parties to this cause, plaintiff, any or either of them? If yea, state when, where, how long, fully and particularly.

Interrogatory 2. Were you acquainted with John Ormsby, who was ever been in your country? If yea, state when you first became acquainted with him, how long you knew him, where he came from, and when he died.

Interrogatory 3. To whom was John Ormsby married? where? by whom? were you present at the marriage? how long did John Ormsby live with his wife? how many children had they? is the plaintiff, Mary, one of them? when was she born? when was she married to Gabriel Swayze? State at length.

Interrogatory 4. Where were John Ormsby and his wife living, when Mary, the plaintiff, was born? how long did they live together after her birth? were they reputed, and did they cohabit together, as man and wife? Have you seen John Ormsby receiving the child?

Interrogatory 5. Of whom was John Ormsby the reputed son? from what part of the country did he come? where did his parents reside? State at length.

Interrogatory. By whom were the attached letters, now shown you, written? in whose possession were they found? are you acquainted with the handwriting? how did you derive your knowledge of it?

Interrogatory 7. Do you know any other matter or thing material to plaintiff? If yea, state the same as fully as if specially interrogated thereto.

The same last set of interrogatories will be administered to Israel Coleman, Mr. Bout, and other witnesses, to be produced, sworn, and examined, on part of plaintiff, before the same commissioner.

W. W. FETTERMAN.

ALLEGHANY COUNTY, *of April Term, A. D.* 1829. *No.* 207.

Oliver Ormsby, late of the county of Alleghany, yeoman, and Sidney Gregg, late of the county of Alleghany, widow, who appears by Neville B. Craig, the committee of her person and estate, were warned to answer Gabriel Swayze and Mary his wife, formerly Mary Ormsby, of a plea wherefore the said Gabl. Swayze and Mary, his wife, in right of the said Mary, and the said Oliver Ormsby and Sidney Gregg, by Neville B. Craig, committee of her person and estate, together and undivided do hold sixty-two acres of land, with the appurtenances of land, situate St. Clair township, Alleghany county, in the manor of Pittsburgh, part of a larger tract called the Coalhill, bounded as follows: beginning at a Spanish oak standing by the side of the river Monongahela; thence south two degrees, east one hundred and twenty-eight perches, to a stake on the northwest side of a road; thence north sixty-five degrees, west one hundred and six perches, to a stake; thence north seventy-four degrees, west twenty-six perches, to a stake;

thence north sixty degrees, west ninety-four perches, to a stake in the corner of said road and on the line of lot No. 54; thence by the same lot north thirty-five degrees, east to the same river Monongahela; thence up the same by the several courses thereof to the place of beginning. They, the said Oliver and Sidney partition thereof between them and the said plaintiffs, according to the laws and customs of this commonwealth to be made, do contradict, and the cause to be done do not permit unjustly and contrary to the same laws and customs, &c,; and whereas the said Gabriel, and Mary his wife, by W. W. Fetterman, the attorney, say that whereas the said Gabriel Swayze and Mary his wife, in right of the said Mary, and the said Oliver Ormsby and Sidney Gregg, by Neville B. Craig, committee of her person and estate, together and undivided do hold the said , with the appurtenances; one part whereof, with the equal parts to be divided, belongeth to them, the said Gabriel Swayze, and Mary his wife, and to the heirs of the said Mary to have; and another part thereof, into the equal parts to be divided, belongeth to the said Oliver Ormsby, to have and to him and his heirs severally; and to the equal third part thereof, unto the said Sidney Gregg belongeth, to have to her and her heirs—to be held by them severally, so that the said Gabriel Swayze, and Mary his wife, in right of the said Mary of the moiety or equal third part of the tract of land affirmed to them *half penny* and *and* the said Oliver Ormsby and Sidney Gregg, of their two equal parts of this said tract of land to their half pay, may severally apported themselves, the said defendants, partition thereof between them and the said plaintiffs, according to the laws and customs unjust, and contrary to the *cave* laws and customs: wherefore, the said Gabriel Swayze, and Mary his wife, say they are *won*, and have damage to the value of five thousand dollars, and thereof *nealy* brought, &c.

W. W. FETTERMAN, *Plff. Atty.*

June 9, 1829.

ALLEGHANY COUNTY, *ss.*

The Commonwealth of Pennsylvania to the sheriff of the county of Alleghany, greeting: If Gabriel Swayze, and Mary his wife, formerly Mary Ormsby, make you secure of prosecuting their claim, then we command you that you summons Oliver Ormsby and Sidney Gregg, Neville B. Craig, the committee of her person and estate, late of your county, so that they be and appear before our judges at Pittsburgh, at our county court of common pleas, there to be held for the county aforesaid, the third Monday of April next, to show wherefore, whereas they the said Gabriel and Mary, and the aforesaid Oliver and Sidney, by Neville B. &c., together and undivided do hold a tract of land, situate in St. Clair township, said county, in the manor of Pittsburgh, part of a tract called the Coalhill: beginning at a Spanish oak standing by the side of the river Monongahela; thence south two degrees, east one hundred and twenty eight perches, to a stake on the northwest side of a road; thence north sixty-five degrees, west one hundred and six perches, to a stake; thence north seventy-four degrees, west twenty-six perches, to a stake; thence north sixty degrees, west ninety-five perches, to a stake in the corner of said road, and in the line of lot No. 54; thence by the same lot north thirty-five degrees, east to the same river Monongahela; thence up the same by the several corners thereof to the place of beginning—with the appurtenances, the same Oliver and Sidney, by Neville B. &c., partition thereof between them, to be made according to the laws and customs of this

commonwealth, in such case made and provided, do gainsay; and the same to be done, do not permit very unjustly, and againstly, and against the same laws (as it is said) and customs, &c.; and have you then there the names of those summonees, and this writ.

Witness, the honorable Charles Shaler, esquire, president of our said court, the seventh day *day* of March, in the year of our Lord one thousand eight hundred and twenty-nine.

Attest: WM. McCANDLESS, *Pro.*

ALLEGHENY COUNTY, *ss.*

GABRIEL SWAYZE, and MARY his wife, formerly MARY ORMSBY,
vs.
OLIVER ORMSBY, deceased, SIDNEY GREGG, by NEVILLE B. CRAIG, the committee of her person and estate.

Issue summons in partition, &c. sixty-two acres of land, situate St. Clair township, Alleghany county, in manor of Pittsburgh, part of a tract called the Coalhill, beginning at a Spanish oak standing by the side of the river Monongahela; thence south two degrees, east one hundred and twenty eight perches, to a stake on the northwest side of a road; thence north sixty-five degrees, west one hundred and six perches, to a stake; thence north seventy-four degrees, west twenty-six perches, to a stake; thence north sixty degrees, west ninety-five perches, to a stake in the corner of said road, and in the line of lot No. 54; thence by the same lot north thirty-five degrees, east to the said river Monongahela; thence up the same by the several courses; thence to the place of beginning.

March 17, 1829.

W. W. FETTERMAN, *Plff. Atty.*

WM. McCANDLESS, *Pro.*

The Commonwealth of Pennsylvania.

PENNSYLVANIA, *sct.*

To the judges of the court of common pleas for the county of Alleghany, greeting:

Because, in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between Gabriel Swayze and Lydia his wife, plaintiffs, and Oliver Ormsby and Sidney Gregg, by Neville B. Craig, committee of her person and estate, defendants, as it is said manifest error hath intervened, to the great damage of the said Gabriel Swayze, and Lydia his wife, as by the complaint of the same Gabriel Swayze, and Lydia his wife, we have received information: we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seal, distinctly and openly, you have before the judges of the supreme court of the said commonwealth, on the first Monday of September next, and this writ, that the record and process aforesaid being inspected, we may further cause to be done, what of right and according to our laws and customs ought.

Witness the honorable John B. Gibson, chief justice of our said supreme court, at Pittsburgh, the twenty-fifth day of September, in the year of our

Lord one thousand eight hundred and twenty-nine, and of the commonwealth the fifty-fourth.

LEONARD S. JOHNS, *Proth'y*
of the Western District.

Allowed by
JOHN TOD.

In obedience to the within writ, the judges of the court of common pleas of Alleghany county do most respectfully certify, that the record and proceedings, with all things touching the same, so full and complete as before them they remain, are herewith sent.

CHARLES SHALER. [SEAL.]
FRANCIS McCLURE. [SEAL.]
[SEAL.]

C.

BUFFALO, *July* , 1791.

DEAR SIR: When I last saw you, I was quite ignorant of the manner in which the Governor spoke to you, and can assure you, most sincerely and truly, I felt very sorry for it. You undoubtedly suppose it was owing to what I said to him. It is natural for you or any other person to think so, but I must declare to you it was not: he was first displeased that you let me go back to him on the disagreeable business; secondly, your disobeying his orderly sergeant, as he said; and thirdly, Mr. Maypother's desiring to know what business he had with you. These three reasons were the cause of his behavior to you. I believe the Governor will affirm to you that I have not, at any time, endeavored to injure you in his opinion, either before he sent you the letter or after. I only begged his instruction, and was in hopes it might have succeeded. Whatever you may have seen amiss in my conduct, in endeavoring to get my beloved wife and child to live with me, was not the effect of envy or malice, but heart-breaking anxiety; as I can safely say, that I have not, nor have I ever had, an inclination to injure you in the smallest degree. On the contrary, I would do any thing in my power to serve you, or any belonging to you, by day or night.

I am now but too well convinced you are not to blame in my wife's staying from me of late: it is her own dislike to me, which I hope God will enable me to remove and change to love. If a virtuous and sober life, and unalterable affection for her, can have any effect, I shall succeed, as I have reason to believe, when you are convinced of my reformation and determination of doing well, you will then endeavor to make us happy together. If you will point out any penance or pain, severer than what I now experience in my banished situation from your family, I will undergo it with pleasure, to be blessed with one kind look from you and family. I would do any thing to obtain your pardon and forgiveness. Oh! my friends, for so I will call you, if you could only read my heart, you would find that its only sentiments are sincere lamentation and repentance for its past follies, and unfeigned prayers for a return of your friendship and esteem. Such are my constant prayers, and such are my daily hopes. What I have done I cannot recall; all I can do is to repent, and guard against the like in future.

I hope you will think I am punished nearly enough for my bad conduct. Forgiveness is a duty incumbent on us all, and as you are blessed with Christian feelings, I know you will not punish me all my life for bad behavior

in the early part of it. I flatter myself when your dear wife recovers her health, which I sincerely pray may be speedily, she will join with you in reconciling my heart's darling to me. Your truly worthy brother, Mr. Hopkins, says he will do what he can to accomplish it. Whatever is done for me shall never be repented. The pangs of distress which I have experienced, has made such an alteration, that I am convinced I shall not do any thing disagreeable to any of my friends in future; and, with tears of duty in my eyes, and a heart almost bursting with distress, I earnestly beg your pardon and forgiveness, and request you, if you have any regard for my life or my senses, to write me a few lines of comfort, if you can. In which hopes, I remain, with all duty and affection to you and yours,

Your hereafter obedient, tho' unfortunate son,

JOHN ORMSBY, jun.

Mr. NATHAN SWAYZE, *Homochitto*.

C.

BUFFALO CREEK, *July*, 1791.

MY BELOVED WIFE: Dead to the world, and equally insensible of its pleasures or its pains, I have long since bid adieu to all joy, and defiance to all sorrow, but what should spring from my dear Lydia—sole source to me of all earthly felicity.

In what terms, oh most lovely of women, can the unfortunate Ormsby address you, and not address you in vain? Is there one method I have left untried? remains there one source unassayed? Yes, time and your own generosity, I hope, will convince you how laudable and virtuous my intentions are; how much the happiness of my life depends upon your kindness, and how determined I am to make you happy if you'll give me an opportunity.

Your reproofs and coldness to me pierce my soul. Look on me, think of me with less rigor, and make me what you please.

Endeavor to forgive, if you cannot forget, the many unhappy hours I have occasioned you, and only remember the many affectionate hours we have passed together, locked in the most fond embrace virtuous love could inspire. If you will mention any way that I can comfort you, or make amends for the distress I have given, with pleasure I will do it, should I even risk my life in the attempt; for what is life to me, if I am deprived of the only comfort I ever expected to enjoy in it—to live with you, and be blessed with your smiles? I could undergo the most excruciating fatigue to support you comfortably and tenderly. On the contrary, to be separate from you would make me miserable had I the noblest fortune under the sun. Think not too harshly of me, thou darling of my soul. You may rest assured that my bad conduct has given me such a detestation against extravagance, that I shall never be guilty of the like again; and I candidly believe the distress it has given me may yet be a blessing, as it has opened my eyes, and discovered to me the true light in which bad behavior is viewed, and the dismal consequences of it.

As to my ever treating you with coldness or indifference, it is out of my power. You are too much mistress of my heart for me to do any thing of that kind, and with many a heart-breaking sigh and affectionate tear, I humbly pray in silence you would only give me an opportunity of convincing you how dear you are to me.

In short, thou angel of my happiness, you are all that is really dear to me, and it shall be the unmerited pleasure of my life to make you happy, whe-

ther I am blessed with your affection or not. But oh! my love, my wife, my all, don't determine on a matter of so much consequence without trying the affection of your husband once more. I will then convince you how much my life shall be devoted to your comfort and that of our dear little daughter, who, I beg you to often kiss for its really affectionate and tender father; and with most fervent and sincere prayers to the Almighty, preserver of us all, to shower down his most tender blessings on you and friends. I remain, my dear Lydia, with every sentiment love, friendship, gratitude, and affection can bless a heart,

Your ever affectionate husband,

JOHN ORMSBY, jr.

The person who carries these as far as the ferry goes afoot, and will not take the linen, &c. for you, but you may depend on having it shortly.

MRS. LYDIA ORMSBY, *Homochitto.*

D.

To the honorable Charles Shaler, President, and his Associate Judges, now holding an Orphan's Court in the city of Pittsburgh, and county of Alleghany:

The petition of Oliver Ormsby, esquire, and Sidney Gregg, widow of Isaac Gregg, by Neville B. Craig, esquire, the committee of her person and estate, surviving heirs at law of Jane Ormsby, deceased, who was the wife of John Ormsby, deceased, merchant, Pittsburgh, above the age of twenty one years—respectfully represents, that

The said Jane Ormsby died intestate, since the passage of the act of the 19th of April, A. D. 1794, leaving issue the above named petitioners, and Joseph Ormsby, who, dying without issue, devised his undivided portion of the following estate to John O. Gregg, who also died without issue, seized in his demesnes as of fee, of and in the following described real estate, situate on the river Monongahela, in the manor of Pittsburgh, part of a tract called the Coalhill: beginning at a Spanish oak standing by the side of the said Monongahela river; thence south two degrees, east one hundred and twenty-eight perches, to a stake on the northwest side of a road; thence north sixty-five degrees, west one hundred and six perches, to a stake; thence north seventy-four degrees, west twenty-six perches, to a stake; thence north sixty degrees, west ninety-five perches, to a stake in the corner of said road, and in the line of lot No. 54; thence by the same lot north thirty-five degrees, east to the said river; thence up the same the several courses thereof to the place of beginning—containing sixty-two acres, except three acres conveyed to Beltzhoover, and about one acre to William Herd.

No petition or valuation or valuation of the said estate having been had, the petitioners pray the court to order and appoint William Robinson, jr., William Hays, William Woods, James Brown, John McKee, Samuel Pettigrew, and Joseph Barclay, esquires, chosen by the petitioners for that purpose, to make partition or valuation of the said premises, according to the acts of assembly in such cases made and provided, and to make report of their proceedings herein at the next orphans' court, after they shall have so parted or valued the same.

And your petitioners, as in duty bound, will ever pray, &c.

O. ORMSBY,
NEVILLE B. CRAIG,
for Sidney Gregg

Order issued.

Petition for the partition or valuation of the estate of Jane Ormsby, dec'd.

December 23d, 1828.—The court appoint William Robinson, William Hays, William Woods, James Brown, John McKee, Samuel Pettigrew, and Joseph Barclay, esquires, to make valuation of the premises described in this petition.

WM. PENTLAND, *Clk.*

E.

Know all men by these presents, that I, John Ormsby, of the borough of Pittsburgh, in the county of Alleghany, and State of Pennsylvania, for and in consideration of my love and affection to my son-in-law Isaac Gregg, and my daughter Sidney, his wife, of the borough aforesaid, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the said Isaac Gregg and Sidney Gregg, their heirs and assigns, the following lot or parcel of land now in the occupation of the said Isaac, whereon his ferry house stands, to wit: beginning at a Spanish oak stump on the south bank of the Monongahela river; and running thence with ye. line of the manor of Pittsburgh south three degrees, east ninety-four perches, to a post; thence south sixty-seven degrees, west fifty-six perches and six-tenths, to a post; thence north three degrees, west sixty-five perches, to the Monongahela river; and thence up that river north eighty-four degrees, east fifty-one perches, to the place of beginning—containing twenty-five acres, lying in the manor of Pittsburgh, formerly in the county of Washington, and now in the county of Alleghany aforesaid; being part of a tract of sixty-two acres. which the honorable John Penn, junior, and John Penn, by deed, dated 31st May, one thousand seven hundred and eighty-six, conveyed in fee simple to Nathaniel Bedford, who, by deed, dated the first of June, one thousand seven hundred and eighty-six, conveyed the same to the said John Ormsby, as by the said deeds recorded in the recorder's office for the county of Washington, in book D, pages 113 and 114, reference thereunto being had, will more fully and at large appear;—to have and to hold the said lot of twenty-five acres hereby granted, with the appurtenances, to the said Isaac and Sidney, their heirs and assigns, as tenants in common forever.

In witness whereof, I have hereunto set my hand and seal, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and four.

JOHN ORMSBY. [SEAL.]

Signed, sealed, and delivered in the presence of
ABNER BARKER,
WM. MCGINNESS, jr.

PENNSYLVANIA, ALLEGHANY CO. *ss.*

Before me, a justice of the peace in and for the said county, came the above named John Ormsby, who acknowledges the above instrument of writing to be his act and deed, and desired that as such it might be entered on record. Given under my hand seal, the day of December, in the year of our Lord one thousand eight hundred and four, and of the independence of the United States the twenty-ninth.

JERH. BARKER.

ALLEGHANY COUNTY, *ss.*

Recorded in the office for recording of deeds, &c. in for said county, in book N., page 162, &c. Given under my hand and seal of office at Pittsburgh, the 22d day of June, 1805.

For SAML. JONES, *Rec'r.*
L. STEWART.

F.

Know all men by these presents, that I, John Ormsby, of the borough of Pittsburgh, in the county of Alleghany, and Commonwealth of Pennsylvania, for and in consideration of my love and affection to my daughter, Sidney Gregg, of the borough aforesaid, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Sidney Gregg, her heirs and assigns, a certain lot or piece of ground, situate on the south side of the Monongahela river, in the manor of Pittsburgh, bounded and described as follows, to wit: beginning at the lower bar post, on the bank of said river, about eight perches below the bank of a run; and running thence down the said river south eighty , west twenty-six perches, to a post; thence by other land of the said John Ormsby south three degrees, east forty eight perches and nine-tenths, to a post on a road; thence, by the said road south seventy-three degrees east twenty-seven perches and five-tenths, to a post; and thence by other land of the said John Ormsby north three degrees, west fifty-nine perches and five-tenths, to the place of beginning—containing eight acres and one hundred and twenty perches, (being part of a tract of sixty-two acres of land which the honorable John Penn, junior, and John Penn, esquires, by deed, dated thirty-first day of May, A. D. 1786, granted and conveyed in fee simple to Nathaniel Bedford, who, by deed, dated the first day of June, A. D. 1786, granted and conveyed the same to me, the said John Ormsby, as by the said deeds, recorded in the office for recording of deeds in and for the county of Washington, in book D, pages 113 and 114, more fully appears)—to have and to hold the said lot of eight acres and one hundred and twenty-two perches hereby granted, with the appurtenances, unto the said Sidney Gregg, her heirs and assigns, to the only proper use of the said Sidney Gregg, her heirs and assigns, forever. In witness whereof, I have hereunto set my hand and seal, this thirteenth day of April, in the year of our Lord one thousand eight hundred and five.

JOHN ORMSBY. [SEAL.]

Signed, sealed, and delivered, in the presence of
L. STEWART,
JERH. BARKER.

ALLEGHANY COUNTY, *ss.*

On the thirteenth day of April, Anno Domini 1805, before me, the subscriber, one of the justices of the peace in and for the county aforesaid, personally came the above named John Ormsby, and acknowledged the above deed poll to be his act and deed, and desired that the same might be as such recorded according to law. Witness my hand and seal.

JERH. BARKER.

ALLEGHANY COUNTY, *ss.*

Recorded in the office for recording of deeds, &c. in and for said county, in book N, page 164, &c.

Given under my hand and seal of office at Pittsburgh, the 22d day of June, A. D. 1805.

For SAML. JONES, *Rec'r.*
L. STEWART.

G.

Last Will and Testament of Joseph B. Ormsby.

My dear, honored, much beloved parent: your son has left you by the mandate of Him who governs all. It is perhaps for the best: I hope so, and trust fully that I shall be saved. My dear father, do not lament the loss of me, but let my dear, worthy, excellent sister and brother, with their sweet offspring, console you. May I request that my dear father will grant, will pay attention to the best wishes of his son in giving John Ormsby Gregg all that property which was destined by you for Joseph Blakeney Ormsby, viz. the piece of land on the Monongahela and the lot in the town of Pittsburgh; and wish also the advantages I might derive from the sales of this cargo may be extended to you, my dear father, and that you may live to enjoy it. Any advantages, of any kind whatever, I might have derived in living that can be transferred, I wish extended to my dear John Ormsby Gregg, but wish he may not dispose of the property so given at any time, but to derive every advantage from it; and could wish him an elegant education, especially in French and Spanish. I wish all my wearing apparel, books, flute, bureau, and in fact every thing I am possessed of, may be delivered to John Ormsby Gregg, with the following incumbrances, viz. ten dollars to Henry Woods, and twenty dollars to Hugh H. Brackenridge, which is all the money I owe, unsettled, and which I wish paid.

JOSEPH B. ORMSBY.

New Orleans, May 30, 1803.

Witness to the signing of the above,
JAS. HUSTON.

ALLEGHANY COUNTY, *ss.*

Before me, Samuel Jones, register for the probate of wills, and granting letters of administration in and for the county aforesaid, came William Wilkins, Jeremiah Barker, and Henry Brackenridge, and they, being duly sworn, according to law, deposeth and saith that they were well acquainted with the handwriting of the above named Joseph B. Ormsby, and that (to the best of their knowledge) the foregoing letter or instrument of writing and that the signature of Jos. B. Ormsby thereunto subscribed, is the proper handwriting of Joseph B. Ormsby; and further these deponents say not. In witness whereof, I have hereunto set my hand this 10th day of June, A D. 1805.

SAML. JONES, *Reg.*

605.

SUPREME COURT OF THE UNITED STATES.

No. ~~87~~ 28.

WILLIAM ROBINSON, Jr., PLAINTIFF IN ERROR,

VERSUS

WM. NOBLE'S ADMINISTRATORS.

ERROR TO DIST. COURT U. S. FOR THE WESTERN DIST. OF PENNSYLVANIA.

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UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judge of the United States for the western district of Pennsylvania: Because in the record and proceedings, as also in the rendition of the judgment of a plea, which in the said court before you, between James Ferguson and William P. Noble, administrators of William Noble, deceased, plaintiffs, and William Robinson, junior,

defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Thomas Irwin, judge of the United States for the western district of Pennsylvania, this eleventh day of May, A. D. 1832, and of the independence of the United States the fifty sixth.

E. J. ROBERTS,
Clerk west. dist. of Pennsylvania.

I, Thomas Irwin, judge of the United States for the western district of Pennsylvania, having taken and approved the bond of William Robinson, jr. the plaintiff in error, with John H. McNickle his security, do allow this writ of error.

Witness my hand and seal, this eleventh day of May, A. D. 1832.

TH. IRWIN.

Pleas in the district court of the United States for the western district of Pennsylvania, before the honorable Thomas Irwin, judge of the United States for the said district, May sessions, 1832.

In the District Court of the United States in and for the western district of Pennsylvania, No. 35, of May term, 1832.

McDonald and Colwell, Holcomb, Fetterman. Walker. 9th March, 1831, Watts.	WILLIAM NOBLE, a resident and inhabitant of the State of Ohio. *vs.* WILLIAM ROBINSON, jr. a resident and inhabitant of the State of Pennsylvania.	Amicable action in covenant, entered as of October term, 1821, as per writing.

(*Writing filed.*)

UNITED STATES' COURT—*western district of Pennsylvania:*

WILLIAM NOBLE, a resident and inhabitant of the State of Ohio, *vs.* WILLIAM ROBINSON, jun. a resident and inhabitant of the State of Pennsylvania.	Amicable action in covenant to be entered as of October term, 1821; and the same proceedings to be had thereon as if process had been regularly issued and served. Dec. 13th, 1821.

WM. ROBINSON, jr.
JN. McDONALD, *Plff's Att'y.*

R. WALKER, esq. *Poth'y.*

Nov. 11, 1822. Rule that security for costs be entered by the first day of next term, or cause shown why it is not done, or non pros; and that all proceedings be stayed till such security be entered.

June 6th, 1823. On motion in open court, rule on pl'ff for payment of costs.

1829, *May 4th*, Narr. filed.

(Narr.)

WESTERN DISTRICT OF PENNSYLVANIA, *United States' Court.*

William Noble, a citizen and resident of the State of Ohio, by his attorneys, McDonald and Colwell, complains of William Robinson, junior, a citizen and resident of the State of Pennsylvania, of a plea of breach of covenant: For that whereas heretofore, to wit, within the jurisdiction aforesaid, on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and twenty-one, by certain articles of agreement in writing, and those *and those* made and concluded between the said William Noble, of the city of Cincinnati, and the said William Robinson, junior, of the city of Pittsburgh, which said writing, sealed with the seals of the said parties, and bearing date the day and year last aforesaid, and now here shown to the court, whereby it was witnessed, among other things, that the said Noble agreed, stipulated, and bound himself to, and with the said Robinson, to transport and deliver to the said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores for the use of the United States' army, supposed to amount to thirty-seven hundred barrels, estimating one-half said stores as flour barrels, the other half as whiskey barrels or pork barrels; the said Robinson delivering over one-half of the same between the first and tenth of March, in the year last mentioned, to said Noble, at Cincinnati, and the other half by the thirtieth of *of* March last aforesaid, at the usual place of deposite, near the mouth of the Ohio river, the delivery of the whole of which stores were to be made and completed in the order in which they were received at the town of St. Louis, on or before the 15th day of April next ensuing the said date of said article of agreement. In consideration whereof, the said Robinson then and there, and thereby agreed and bound himself to pay to the said Noble one dollar and fifty cents per barrel, one half whereof is to be paid on delivery of said stores at St. Louis, in specie funds, or their equivalent, and the other half in Cincinnati, in the paper of banks current therein, that is, as expressed and understood in a postscript to said articles of agreement, in paper of the Miami Exporting Company, or its equivalent, at the period of the delivery of said stores at St. Louis. In testimony of all of which, the said parties bound themselves, each to the other, in the sum of five thousand dollars, to be paid on the failure of compliance with the aforesaid stipulations. And the said Noble, in fact, saith that, after the making the article of agreement aforesaid, to wit, in the month of March, in the year eighteen hundred and twenty-one aforesaid, he, the said Noble, received on board the steamboat Paragon all the stores and lading which were offered by the said Robinson, both at the said city of Cincinnati, and at the usual place of deposite near the mouth of the Ohio river, and conveyed in the said steamboat Paragon all such stores as were delivered by said Robinson on board of said boat, according to the stipulations of said articles of agreement, to said town of St.

Louis, and delivered them there on the sixth day of April, in the year eighteen hundred and twenty-one, to the said Robinson in person: and the said Noble further saith that he hath faithfully done and performed all and singular the agreements, covenants, and stipulations, made and contained in said article of agreement, and by him to be performed and kept, according to the true tenor thereof; yet the said Robinson did not deliver one-half of the said amount of thirty-seven hundred barrels of army subsistence stores, or any other equivalent freight, to the said Noble, or on board the said steamboat Paragon, at Cincinnati, between the first and tenth of March, in the year the eighteen hundred and twenty-one, although the said Noble and the said boat was, during that time, ready and waiting to receive the same; and said Robinson did not, on or before the thirtieth day of March, in the year last aforesaid, nor afterwards deliver to said Noble, at the usual place of deposite, near the mouth of the Ohio river, the other half of the said thirty-seven hundred barrels of army subsistence stores, or on board of said boat at said last mentioned place, although the said boat was there ready and waiting to receive the same, after the said thirtieth of March, in the year last aforesaid; and although the said Noble has frequently, before and after that time, requested the said Robinson to furnish the stores and freight stipulated for as aforesaid; and the said Noble further in fact saith, that the said Robinson hath not paid to the said Noble, nor to his use, the said sum of one dollar and fifty cents per barrel on the delivery of such amount of said stores as were actually carried in said steamboat and delivered, in all respects, in accordance with the tenor of the articles of agreement aforesaid, at St. Louis, in specie or otherwise; nor hath the said Robinson paid to the said Noble, in any money, by the barrel, according to the price stipulated as aforesaid or otherwise, for such amount of said army subsistence stores as the said Robinson was, by the tenor of said articles of agreement, bound to furnish for freights to St. Louis, as above recited, but, on the contrary, hath wholly refused to pay the amount stipulated by him to be paid as aforesaid, in the manner or at the times above mentioned, or at any other times, or in any other manner. And the said Robinson hath further neglected and omitted to perform, in manner by him agreed as above mentioned, the stipulations and covenants made as aforesaid, but the same hath broken and not kept, contrary to the tenor and spirit of said articles of agreement, whereby the said Noble not only was deprived of the amount agreed to be paid him by said Robinson in manner aforesaid, but also of other great gains and profit which might and would otherwise have arisen and accrued to him during the time of detention of said steamboat, caused by the non-performance, by said Robinson, of his agreements aforesaid. And the said Noble was, and is, by means of the premises, otherwise greatly injured and damnified, to wit, &c. &c.: and so the said Noble in fact saith, that the said Robinson hath not kept his said covenants and agreements, but hath broken the same, and to keep them hath wholly refused, and still doth neglect and refuse, to the damage of said Noble of five thousand dollars; and therefore he brings suit, &c.

McDONALD & COLWELL,
Att'ys for Pl'tff.

Pledges, JOHN DOE,
RICHARD ROE,

1831, May 21st. Depositions taken by consent of attorneys, filed.

(*Interrogatories, cross interrogatories, agreement, and depositions.*)

District Court of the United States for the western district of Pennsylvania, No. 35, of May term, 1822.

WILLIAM NOBLE'S Administrators,
vs.
WILLIAM ROBINSON, junior.

Interrogatories on part of plaintiff, upon which testimony of witnesses, to be taken, returned into court, and read, as per agreement of the counsel of the above parties hereto annexed.

Interrogatory 1. Were you acquainted with the said Wm. Noble in his life time, or with the said William Robinson, junior, before the year 1822?

Interrogatory 2. Had you any knowledge of a written contract between the said William Noble and the said William Robinson, junior, entered into in the month of February, 1821, for the transportation of certain subsistence stores, by the said Noble, in the steamboat Paragon, from the city of Cincinnati, and other places, to the city of St. Louis? and, if so, state all you know as to the manner in which the said contracts of affreightment was complied with, as well on the part of the said Robinson as of the said Noble, setting forth dates, and all particulars within your knowledge.

Interrogatory 3. Could the steamboat Paragon, within the time specified for the fulfilment of the contract above mentioned, have obtained sufficient freight and passengers to keep her well employed?

Interrogatory 4. If well employed, what could the steamboat Paragon have earned per week or month, at or within the time referred to in the last interrogatory?

Interrogatory 5. State, if you know, whether the said steamer Paragon was in good running order all the time above mentioned.

Interrogatory 5. If you know any thing else touching this matter, state the same fully.

McDONALD & COLWELL,
Att'ys for Pl'ff.

PITTSBURGH, *April* 28, 1831.

Cross interrogatories.

Cross interrogatories by defendant, to be administered to the witnesses to be examined on the part of the plaintiff.

1. Was the steamer Paragon ready to receive, or did she receive, any quantity of subsisting stores on or before the 30th March, 1821, from said defendant? and, if so, did she transport them from the usual place of deposite near the mouth of the Ohio, and deliver them at the town of St. Louis, on or before the 15th day of April ensuing?

2. How was the steamer Paragon employed during the months of February, March, and April, of the year A. D. 1821? Did she carry freight for others than the defendant, and, if so, what were her profits? State particularly.

3. Do you know the current value of the bills of the Miami Exporting Company, in specie funds, at Cincinnati and other places, on or about the 15th March, 1821? If yea, state the same particularly.

4. Do you know any other matter or thing material to the defendant in this case? If yea, state the same as fully as if particularly interrogated thereto.

H. M. WATTS, *for Deft.*

Agreement of Attorneys.

UNITED STATES—*Western district of Pennsylvania, ss.*
District Court at Pittsburgh, No. 35, *May term,* 1822.

WILLIAM NOBLE'S Administrators,
vs.
WILLIAM ROBINSON, junior.

The undersigned, counsel for the respective parties in this case, agree that the testimony of any witnesses may be taken before any mayor, alderman, or justice of the peace, who will certify himself to be such, upon the foregoing interrogatories and cross interrogatories, to be read in evidence in this case, without exception, except as to the credibility or admissibility of the testimony, as evidence. If depositions be taken at different places, they may be taken on copies of these interrogatories and this agreement. The officer taking the depositions to certify the same under his seal of office, and enclose them, with the interrogatories, sealed up, to the clerk of the district court of the United States, Pittsburgh, and deliver the same to the persons for whom he has acted. The execution of the article of agreement is admitted by defendant.

McDONALD & COLWELL,
Att'ys for Pl'ff.
H. M. WATTS, *Att'y for Def't.*

29*th April,* 1831.

Depositions.

Richard Miller, of lawful , being duly sworn, deposeth and saith, in answer to the following interrogatories:

Int. 1. I was acquainted with both.

Int. 2. I was acquainted with the contract. I commanded the st. b't Paragon during the performance of that contract and after. We loaded what we supposed one-half the contract, at Cinc. in the early part of March, 1831; while loading at Cinc. (not being quite sufficient of W. R. by the contract to load her,) we took in some other freight; while doing that, W. R. insisted that we should desist, and take in more of his, else we would not be able to take in the balance of his the second trip. We accordingly refused to take other freight, and took in what of his own he wished. We proceeded with the first load, and, on the passage, grounded near St. Genevieve, where we lay several days. While aground, W. R. insisted I should employ another st. b't, then repairing at St Genevieve, to lighten her off, and that he would protest against any part of his cargo being put on shore. Seeing no prospect of getting off without, and in order to fulfil the contract, I engaged said st. boat to take part of the cargo to St. Louis, at an extravagant price; but before the boat reached us, and while on her way down to us, (she having grounded) we fortunately got off the bar; consequently did not need her assistance, nor incur any expense. We then proceeded to St. Louis, and discharged the cargo in good order; then returned to the mouth of Ohio in the

time stipulated in the contract, where we waited one or more days (I think 30th and 31st March, and a day or two in April) for part of the second load, it not having arrived; what had arrived there was owing altogether to the exertions of W. Noble, as he took charge of it at Cinc. and came down with it himself. After waiting there, we proceeded up the Ohio some distance, and met another part of it in keels, in all, two-thirds or three-fourths of a load. We took this in, and then proceeded to St. Louis, and discharged it there in good order, within the time named in the contract: we could have taken a full load as easily as what we did. At St. Louis, W. R. paid $2,400, or thereabouts, in specie. The reason then assigned for the deficiency in the second load was, that one or two of the flat boats containing some of W. R.'s flour, intended for this load, had sunk on their way to Cincinnati.

Int. 3. The S. B. Paragon was then engaged in the New Orleans trade, and that was the season of business: she, no doubt, would have been constantly and profitably employed.

Int. 4. Am unable to say; we kept no acc't of her monthly profits.

Int. 5. The S. B. Paragon was in good running order all the time; nearly as great an accident as could have happened her, except exploding her boiler, occurred on her second trip up to St. Louis—the breaking her tumbling shaft, which detained her some two days repairing it.

Int. 5. I am not aware of any thing else.

+ *Int.* 1. The S. B. Paragon was ready at the mouth of Ohio to receive those stores, on the 30th March, 1821, and was detained for the want of them: what arrived then was taken on board, and we run up the river some distance to get the remainder that was taken on board. They were delivered, (the last load) on or about the 6th April, 1821; about two-thirds or three-fourths of a load.

+ *Int.* 2. The S. B. Paragon came up to Cinc. from New Orleans, in the latter part of February, and commenced loading those stores the beginning of March, and was employed in transporting them until some time in April. On or about the 6th April, the delivery was completed: we then proceeded to Louisville, took in a cargo, and proceeded to N. Orleans, in which trade she was engaged all the boating season. I cannot state what were the profits while engaged in other business: her accounts were not kept in such a manner as to enable me to do it.

+ *Int.* 3. I do not.

+ *Int.* 4. I do not, that I am aware of.

RICHARD MILLER.

Sworn to, and subscribed, before me, on the 11th day of May, 1831.

E. HOTCHKISS, *Mayor.*

Oliver M. Spencer, of lawful age, being duly sworn, deposeth and saith, in answer to the interrogatories on the part of the plaintiff—

To the first interrogatory, I answer I was acquainted with William Noble in his life time, but had no acquaintance with William Robinson, jun'r.

To the second interrogatory, I answer I had no knowledge of any written contract between William Noble and William Robinson, jun'r.

To the third interrogatory, I answer, I do not know.

To the fourth interrogatory, I answer I do not know.

To the fifth interrogatory, I answer I do not know.

To the first cross interrogatory by defendants, I answer I do not know.

To the second cross interrogatory, I answer I do not know.

To the third cross interrogatory, I answer: The current value of the bills of the Miami Exporting Company, on the 1st of April, 1821, was sixty-six and two-third cents in specie: they now command from seventy to seventy-five cents in specie, and are intrinsically worth ninety cents in specie.

To the second fifth interrogatory of the plaintiff, I answer that, although I do not know that William Noble was indebted to the Miami Exporting Company on his own note, or draft, yet I do know that he was liable, as an endorser, for a considerable amount due to said company, and then under protest. I was then, and for some time before and since, president of the said Miami Exporting Company.

O. M. SPENCER.

Sworn to, and subscribed, before me, this 12th day of May, 1831.

E. HOTCHKISS, *Mayor.*

THE STATE OF OHIO, *City of Cincinnati, ss.*

In pursuance of the annexed agreement, the foregoing deposition of Richard Miller was taken, subscribed, and sworn to, before me, E. Hotchkiss, acting mayor of the city of Cincinnati aforesaid, at my office, in the city aforesaid, on the 11th day of May, 1831, the same having been drawn up by the said Miller, in his own handwriting, in my presence, in answer to the interrogatories written on the annexed sheet preceding the aforesaid agreement. And in pursuance of the aforesaid agreement, the foregoing deposition of Oliver M. Spencer was taken, subscribed, and sworn to, before me, at my office in the City of Cincinnati, on the 12th day of May, 1831, the same having been drawn up by the said Spencer, in his own handwriting, in my presence, in answer to the foregoing interrogatories. The foregoing depositions were taken to be read in evidence on the trial of a cause now pending in the district court of the United States for the western district of Pennsylvania, in which William Noble's administrator is plaintiff, and William Robinson, jr. is defendant.

In witness whereof, I have hereunto set my hand, and affixed the seal of said city, this 12th day of May, 1831.

[L. S.] E. HOTCHKISS, *Mayor.*

1831, July 19th. Recognizance of Stephen Colwell, esq. as security for costs filed.

In the District Court of the United States for the western district of Pennsylvania, No. 35 of May term, 1822.

WILLIAM NOBLE,
vs.
WILLIAM ROBINSON, jr.

I, Stephen Colwell, esq. do hereby undertake, that, if the plaintiff in the above action shall not pay the costs which, by law and the practice of the court, he may become liable to pay, that I will pay the same.

S. COLWELL.

Taken, acknowledged, and subscribed, this 19th day of July, A. D. 1831, before me.

E. J. ROBERTS, *Clk.*

1831, August 8th. Rule to plead in thirty days or judgment. (Copy.)
1831, August 15th Rule returned "served."
1831, August 18th. Defendant's pleas of performance and payment filed. Replication pl'ff filed 30th September, 1831.

(*Pleas.*)

WILLIAM ROBINSON, jr.
ats.
WILLIAM NOBLE,

In the Dis. Court of the United States for the western dis. of Penn.
No. 35, *of May term*, 1822.

The said W. Robinson, by H. M. Watts, his attorney, comes and defends the wrong and injury, when, &c.; because, he saith, that he, the said Robinson, did, on the day of perform all such covenants as, on his part, were to be done and performed, according to the form and effect of said indenture, and of the said covenant of the said Robinson, by him on that behalf made as aforesaid. And of this, the said Robinson puts himself upon his country, &c.

And the said Robinson further saith, that he, the said Robinson, did pay to the said Noble all such sum or sums of money that he, the said Robinson, was required to pay according to the tenor and effect of the said indenture mentioned. And of this, he, the said Robinson, puts himself upon his country, &c.

H. M. WATTS,
Att'y for Def't.

18*th August*, 1831.

WM. NOBLE'S Adm'rs,
vs.
WM. ROBINSON, jr.

And the plaintiffs above named, as to the plea of the said Wm. Robinson, jr. first above pleaded, and as to the plea secondly above pleaded, and whereof he hath put himself upon the country, do the like.

S. COLWELL,
Pl'ff's. Att'y.

30*th Sept.*, 1831.

And now, to wit, October 1st, 1831, the plaintiff's death is suggested, and James Ferguson and William P. Noble, citizens of the State of Ohio, administrators of all and singular, the goods and chattels, rights and credits, which were of William Noble, deceased, are substituted as plaintiffs.

1831, October 12. Subpœna on part of deft. to John K. McNickle and James R. Butler.

1831, October 18th and 19th. Tried by jury, and verdict for the plaintiffs for two thousand three hundred and seventy-seven dollars and thirty-six cents.

1831, October 19th. Motion by Mr. Watts for a new trial.
" " 20th. Reasons assigned by Mr. Watts for a new trial, filed, viz.

NOBLE'S Administrators,
vs.
ROBINSON.

No. 35 *of May term*, 1822.

The counsel for deft. very respectfully submits the following points as reasons for a new trial in the above case:

1 error. Your honor instructed the jury that deft. had contracted to deliver for transportation, 'near' the amount of 3,700 barrels, and that, according to the terms of this contract, it is a proper estimate of damages sustained by plaintiffs, to charge at the rate of $1 50 specie currency, for the difference in the amount of barrels delivered, and what the def't contracted to deliver.

2 — Your honor instructed the jury that it was necessary for the def't to tender the Miami Ex. Co. paper, or the equivalent of such paper, in specie currency, to the pl'ff; and that, inasmuch as there was no tender proved, the pl'ff must recover, according to the terms of this contract, the numerical amount of such paper in specie currency, altho' it was proven that, at the time of the breach of said contract, the value of said Miami Ex. Co. paper was depreciated 33⅓ per centum.

3 — Your honor erred in laying down the principle too broadly, that the "lex loci contractus" must, in all cases, prevail, and in making the case in 1 Ohio Rep. 203, the rule of decision of the present case.

4 — The verdict of the jury was against the weight of the evidence.

H. M. WATTS,
Counsel for Def't.

PITTSBURGH, 20*th Oct.* 1831.

1831, November 18. After argument, the court award a new trial.
1832, May 7th. Defendant's account filed.

Account.

DR. *William Noble in acc't with Wm. Robinson, jr.* CR.

1821			1821		
Ap. 6,	To cash paid (specie) at St. Louis -	$2,400 00	Ap. 6,	By transportation of 3,105 barrels of public stores to St. Louis, one-half thereof payable in specie, (say 1,552½ barrels, $1 50 per barrel, - -	2,329 12
	Do. p'd Robert Buchannan -	231 00			
	P'd d'ft favor of Z. Biggs - -	346 00			
July 4,	P'd Bean & Butler - - -	527 00		By one-half the above, say 1,552½ barrels, payable in Miami Exporting Co. notes, or their equivalent in specie, at $1 per bll. - - -	1,552 50
				By $166 in Ky. bank notes, equal in specie to - - - -	83 00
				By this sum in specie, paid on acc't -	49 00
					4,013 62
				By balance - - - -	509 46
				By bill at bar - - -	8 62
	Balance due Noble - - -	509 46			518 08

Whereupon, on the 7th day of May, 1832, the said plaintiff and defendant, personally, and by their attornies, appeared in the said court, and a jury being called, came, to wit, Wm. McCreary, Ephraim L. Blaine, Robert Stewart, Robert H. Douthitt, Arnold Plummer, James Fleming, David McMurtrie, jr. Thomas Baird, George R Espy, John Findley, William Graham, jr. and Joseph Budd, twelve good and lawful men of the said district, who, being duly summoned, balloted for, empannelled, and sworn, did say that they find for the plaintiffs the sum of three thousand three hundred and ninety-one dollars and fourteen cents, with all costs of suit: whereupon it was adjudged by the said court that the plaintiffs have judgment for the said sum and costs; and the defendant's alleging that the court had, in their charge. misdirected the jury trying the said cause, had leave of the said court to file his reasons therefor, and they were filed accordingly: and which reasons, together with the answers of the court, are as follows:

In the District Court of the United States for the western district of Pennsylvania.

Be it remembered that, at the term of May, No. 35, A. D. 1822, came William Noble, a citizen of the State of Ohio, by his attorney, John McDonald, into the aforesaid court, before the judge of said court, and impleaded William Robinson, jr. a citizen of Pennsylvania, in a certain action of covenant, in which said Noble declared against said Robinson, (prout narratio.)

And, thereupon, the said defendant entered his pleas of performance and payment, (prout same,) to which said pl'ff replied (prout replication;) and thereupon issue was joined, (prout same.;)

Afterwards, to wit, in the seventh day of May, A. D. 1832, at the sitting of said court, at the city of Pittsburgh, in and for the said western district of Pennsylvania, before the hon. Thomas Irwin, appointed to hold said court, and duly commissioned for that purpose, the aforesaid issue came on to be tried by a jury; at which time and place came there, as well the said Noble's administrators, by their attorneys, S. Colwell and W. W. Fetterman, esquires, and the said William Robinson, jr. by his attorney, H. M. Watts; and the jury being duly empannelled to try the said issue, were then and there, in due manner, chosen and sworn to try said issue. The counsel of said pl'ff, to maintain and prove the said issue on their part, gave, in evidence, a certain article of agreement, under the seals of the said Noble and the said Robinson, as follows, to wit:

"Article of agreement entered into this 24th day of February, between Wm. Noble, of the city of Cincinnati, of the one part, and William Robinson, jr. of the city of Pittsburgh, of the other part, witnesseth: That the said Noble hereby agrees, stipulates, and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores for the use of the United States' army, supposed to amount to thirty-seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whiskey or pork barrels, the said Robinson delivering the one-half of the same between the 1st and 10th March to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposite, near the mouth of the Ohio, the delivery of which stores is to be made and completed in the order in which they are received at the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof, the said Robin-

son hereby agrees and binds himself to pay to the said Noble one dollar and fifty cents per barrel, one-half whereof is to be paid on the delivery of said stores at St. Louis, in specie funds, or their equivalent, and the other half in Cincinnati, in the paper of banks current therein at the period of the delivery of said stores at St. Louis. In testimony whereof, the parties bind themselves, each to the other, in the sum of five thousand dollars, to be paid on the failure of the compliance with the aforesaid stipulations, and have hereunto set their hands and seals, this 24th Feb'y, 1821.

(Signed) WM. ROBINSON, jr. [SEAL.]
WM. NOBLE. [SEAL.]

In presence of WM. IRWIN,
GEO. P. TORRENCE.

"It is understood that the payment to be made in Cincinnati is to be in the paper of the Miami Exporting Company, or its equivalent."

(Signed) WM. ROBINSON, jr.

The pl'ffs further gave in evidence the depositions of Richard Miller, taken under an agreement of the parties, by interrogatories and cross interrogatories, (prout the same.)

Pl'ffs then exhibited their accounts current against said Robinson, (prout the same.)

Defendant, by his counsel, then and there exhibited his account, in which the following payments were admitted by the pl'ff's counsel, to wit:

On the 6th day of April, 1821 - - - -	$2,400
" paid Robert Buchanan - - -	231
4th day of July, 1821 - - - -	346
" " " " - - - -	527

Prout acc't filed and accompanying the record.

The defendant then gave in evidence the receipt of defendant, in pl'ff's possession, for the delivery of the subsistence stores at St. Louis, (prout same.) Also an account current, rendered by pl'ff, dated the day of April, 1821, and proved, and under the seal of the Corporation of Cincinnati, (prout the same.) Also the deposition of O. M. Spencer, (prout the same.)

Whereupon the said counsel for said defendant, did most respectfuly request the said court to charge the jury as follows, to wit:

1. That is an inflexible rule in the construction of contracts, so to interpret hem as to effectuate the intentions of the parties. That is within the province of the jury to determine what the intention was at the time of the execution of the instrument, according to the rules of construction the court may advise.

2. That the contract upon which the present action is instituted, is not a contract of affreightment by charter party. There is no hiring of the ship. It is a contract for the conveyance of merchandise in a general ship. That the plaintiff cannot recover damages according to the number of tons the ship was capable of containing, but that his damages must be limited, according to terms of the contract, to the actual freight earned upon the cargo. delivered.

3. That the words, the spirit, and meaning, of the contract, preclude the plaintiff from recovering from the def't more than the actual value of the

Miami Exporting Company paper at the time it became due, according to the scale of depreciation.

4. That, under this contract, there was no legal obligation upon def't to tender to plaintiff the amount due him in the depreciated currency of the Miami Exporting Company, in order to save himself from the payment of the numerical value of the notes, inasmuch as the def't reserved to himself the right either to pay in the depreciated currency, or *in its equivalent.*

5. That the plaintiff cannot recover, in the present action at law, the freight for goods actually transported, and damages for the breach of the contract for non-delivery of all the stores def't contracted to deliver for transportation.

H. M. WATTS,
8th May, 1832. *Pl'ff's Att'y.*

To which points, his honor, the judge, replied as follows, in his charge to the jury:

Answer to def't's points.

1. It is certainly true that the intention of the parties to a contract must govern its construction, provided that no violence is done to the rules of law in seeking to effectuate such intention, and it is the province of the jury to judge, from the language of the contract, what that intention is, subject to the opinion of the court as to its legal effect.

2. The contract which is the subject of the present suit, is not a contract of affreightment by charter party; and, in strictness, the plaintiff cannot recover damages according to the number of tons the boat was capable of containing. The rule of law, in cases where there has been a failure to furnish the stipulated freight, and there exists no charter party, is for the jury to take all circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport in addition to that which was furnished. If the lading should not be complete without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and such average is the proper measure of damages.

3d and 4th. The actual specie value of the paper of the Miami Exporting Company, at the time it became due by the contract, is not the true measure of damages. It was made, and to be executed in the State of Ohio, and the laws of that State must therefore govern this case. The defendant having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he had covenanted to perform, is, by the laws of Ohio, entitled to recover the numerical value of the paper of the Miami Exporting Company, in specie, with interest.

In answer to the last point, the court say that the plaintiff's claim, not only for the freight actually transported and delivered, but damages for failing to furnish as much freight as the article stipulates for; if the testimony supports their claim, they may, in the present action, recover damages for such failure.

Whereupon, the counsel for the defendant excepted to the opinion of the court upon the several points aforesaid, and requested the court to seal a bill of exceptions; which is hereby done accordingly.

In testimony whereof, I have hereunto set my hand and seal, this 8th day of May, A. D. 1832.

TH. IRWIN. [SEAL.]

May 9th, 1832. The jury empannelled as aforesaid, rendered their verdict, finding in favor of the plaintiff the sum of three thousand three hundred and ninety-one dollars and fourteen cents; upon which verdict the court entered judgment.

And the said defendant having, according to the provisions of the several acts of Congress in such cases made and provided, filed his bond, which was approved by the court, (a copy whereof is at tached to this record,) and perfected his appeal to the Supreme Court of the United States, at Washington city; which said appeal is allowed by the court; and I, the clerk of the said court, being directed accordingly, do hereby certify that the whole record thereof is truly copied, and that I have, in so certifying, fully complied with the orders of said court, and the provisions of the acts of Congress in such cases made and provided.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at the city of Pittsburgh, the tenth day of July, A. D 1832, and of the independence of the United States the fifty-seventh.

[SEAL.] E. J. ROBERTS,
Cl'k U. S. court west. dist. of Penn.

Copy of the citation issued in the foregoing suit, with the endorsement thereon.

UNITED STATES, *Western district of Pennsylvania, ss.*

The President of the United States to the marshal of the western district
[SEAL.] of Pennsylvania, greeting:

Whereas William Robinson, jr. has this day sued out his writ of error to a certain judgment in covenant, recovered against him on the 9th day of May, A. D. 1832, in the district court of the United States for the western district of Pennsylvania aforesaid, by James Ferguson and William P. Noble, administrators of William Noble, deceased, plaintiff, and the said William Robinson, jr. def't, returnable in the Supreme Court of the United States on the second Monday of January next: these are therefore to command you, that you make known to the said James Ferguson and William P. Noble, administrators of William Noble deceased, that they be and appear to the said writ of error, in the said Supreme Court, on the first day of the next term thereof, to hear an assignment of errors thereof; and hereof fail not at your peril; and how you shall have executed this writ of citation, make return to our clerk of our said western district of Pennsylvania, at Pittsburgh, on the rule day of said court, for the month of June next.

Witness the hon. Thomas Irwin, esq. judge of the United States for the western district of Pennsylvania, at Pittsburgh, this 11th day of May, 1832, and in the fifty-sixth year of the independence of the United States.

Endorsed, TH. IRWIN.

"I accept service of the citation, and waive service on the defendant in error."

"*May* 14*th*, 1832." S. COLWELL,
Att'y for def'ts in error.

June 4th, returned as above. E. J. R. *C'lk.*